THIRD COUNTRY NATIONALS AND EUROPEAN UNION LAW

A critical analysis of issues in European Community and European Union Law regarding natural persons who are nationals of third countries and live in Member States, and regarding immigrants and immigration from third countries

by
Álvaro Castro Oliveira

Thesis submitted for assessment with a view to obtaining the Degree of Doctor of the European University Institute in Law

Florence, 1996

European University Institute - Department of Law

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para ti Andréa

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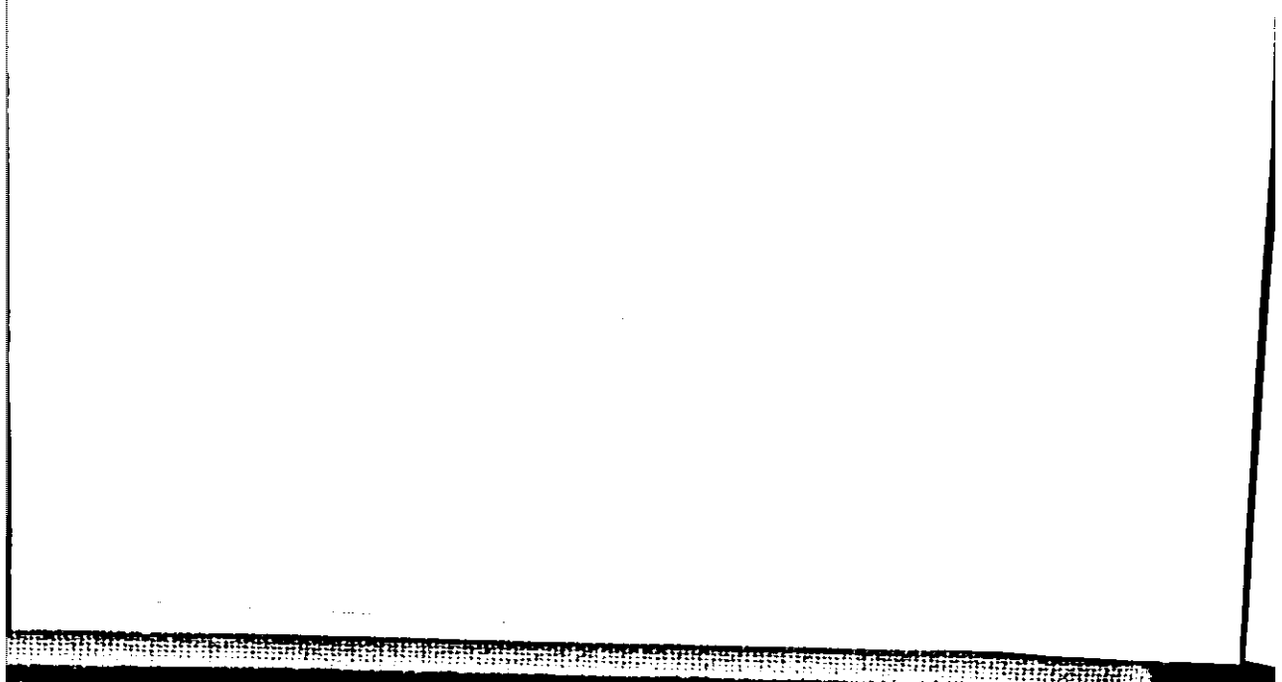

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LIST OF PRINCIPAL ABBREVIATIONS

AFDI	Annuaire Français de Droit International
AJCL	American Journal of Comparative Law
AHWGI	Ad Hoc Working Group on Immigration
A.G.	Advocate-General
ASPE	Agenzia di Informazione - Dibattito Disagio Pace Ambiente
Bull. EC	Bulletin of the European Communities (Commission)
Bull. EU	Bulletin of the European Union (Commission)
CCME	Churches Commission for Migrants in Europe
CDE	Cahiers de Droit Européen
CMLRev	Common Market Law Review
CMLR	Common Market Law Report
Court of Justice	Court of Justice of the European Communities
D&R	Decisions and Reports (of the European Commission of Human Rights)
doc. ref.	document reference
EAEC	European Atomic Energy Community
EC	European Community or European Communities
E.C.H.R.	European Convention for the Protection of Human Rights and Fundamental Freedoms, of 4/11/1950,
ECR	Reports of cases before the Court of Justice and the Court of First Instance (of the European Communities) - European Court Reports
ECSC	European Coal and Steel Community
EC Treaty	Treaty establishing the European Community (as amended by the Treaty on European Union)
ed./eds.	editor/ editors
EEC Treaty	Treaty establishing the European Economic Community (before being amended by the Treaty on European Union)
EIPA	European Institute of Public Administration (Maastricht)
EIRRev.	European Industrial Relations Review
EJIL	European Journal of International Law
ELR	European Law Review
EP	European Parliament
ETS	European Treaty Series
EU	European Union
EUI	European University Institute (Florence)
FIDE	Fédération internationale pour le Droit Européen
Fordham Int'l L.J.	Fordham International Law Journal
GA	General Assembly (United Nations)
HMSO	Her Majesty's Stationery Office
HRLJ	Human Rights Law Journal
ICLQ	International and Comparative Law Quarterly
ILM	International Legal Materials
ILPA	Immigration Law Practitioners' Association
INLP	Immigration & Nationality Law and Practice

LIST OF PRINCIPAL ABBREVIATIONS

JCMS	Journal of Common Market Studies
JDI	Journal de Droit International
LIEI	Legal Issues of European Integration
MLR	Modern Law Review
MNS	Migration News Sheet
NJB	Nederlands Juristenblad
No.	Number
NVwZ	Neue Zeitschrift für Verwaltungsrechts
nyr	(case) not yet reported
OJ L or C	Official Journal of the European Communities - L or C series
RMC	Revue du Marché Commun
RMCUE	Revue du Marché Commun et de L'Union Européenne
RMUE	Revue du Marché Unique Européen
RTDE	Revue Trimestrielle de Droit Européen
S.E.A.	Single European Act
TEU	Treaty on European Union
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
UK	United Kingdom
Vol.	Volume
Yearbook E.C.H.R.	Yearbook of the European Convention of Human Rights
YEL	Yearbook of European Law

Les hommes naissent et demeurent libres et égaux en droits
Les distinctions sociales ne peuvent être fondées que sur l'utilité commune

Article Premier
Déclaration des Droits
de L'Homme et du Citoyen
26/8/1789

Chapter 1

INTRODUCTION

A) INTRODUCTION TO THE THESIS

1 - The Scope of the Research

This thesis analyses issues in European Community Law and European Union Law related to immigration from third countries into the Union and regarding natural persons already living within the countries of the Union who do not have the nationality of a Member State.

For the sake of simplicity these persons are referred to as third country nationals, or immigrants from third countries. In the absence of indications to the contrary, these expressions should be understood as comprising three categories of persons who live in a Member State of the European Union [hereinafter "Member State"]: first, nationals of a third country who have immigrated into a Member State; secondly, persons born in a Member State but who have the nationality of a third country and, finally, also stateless persons. In 1992 these three categories made up a total of about 10 million persons.[1]

The key concern of this thesis is the situation of third country nationals belonging to national or racial groups who are socially disadvantaged. Clearly, in certain areas, Swiss, (white) American or even Japanese entrepreneurs or managers are in a completely different position to that of Algerian, Chinese or Peruvian low-skilled workers. The latter have a far less advantageous socio-economic status in comparison to the former. They are the ones in need of more attention from public institutions and from the society as a whole. Thus, they are the main concern of this thesis. However, in certain other domains, any person not having the nationality of a Member State can confront basically the same problems - like those pertaining to exclusion from the rights granted only to nationals of a Member State. In this aspect, the thesis will examine in the same manner the position of all third country nationals.

On the other hand, it should also be noted that, with the entry into force of the Agreement on the European Economic Area, almost all Community rules apply to nationals of countries that are members of the EEA, but not of the European Union.[2] Consequently, if these persons are subject to the same rules as are nationals of a Member State, the analysis undertaken in this thesis on third country nationals does not apply to them.

It is also important to note that this thesis does not analyse in depth legal issues concerning the fight against racism and racial discrimination at the level of the European Union. Occasionally issues related to this topic will be mentioned. However, this area seems to be too important and complex to be properly dealt with as a mere part of a PhD thesis. Furthermore, the fight against racial discrimination is also related to general aspects of the legal status of third country nationals, which up to now are mainly in the domain of national legislation.

Finally, this thesis does not intend to address, as such, problems pertaining to immigration for refugees and asylum seekers - notably the formation of a European

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[1] This figure is calculated as if in 1992 Austria, Sweden and Finland were already Member States. See Eurostat *Rapid Reports on Population and Social Conditions*, 1994, No.7, pp.6-7.

[2] These are Iceland, Liechtenstein and Norway.

refugee policy. Again, these problems are vast and important enough to be studied in themselves. Naturally, refugees are also nationals of third countries and in that capacity their position will be analysed here. Furthermore, on a number of occasions, reference will be made to legal issues specifically regarding refugees and asylum seekers - as in the case of the Community legislation on coordination of social security schemes and of the Schengen Agreements. However, analysis of the problems of refugees will be undertaken only exceptionally. It is justified by their very close relation to the matters to be analysed in this thesis. Besides, that reference to refugee problems is also useful to highlight and put in context certain points to be made on third country nationals in general.

The scope of the thesis is limited to issues in European Community Law and European Union Law regarding immigration from third countries and regarding nationals from third countries living in a Member State [hereinafter "immigration matters"]. Naturally, I am aware that issues in European Union Law are not the only issues at stake, nor the only important ones regarding immigration matters in the Member States. Issues in national legislation regarding immigration continue to be very important, if not of utmost importance. However, the concern of this thesis is with issues at the level of European Union Law. National legislation will be often referred to, but only to give the national background of discussions developed at the level of the Union, to illustrate the problems and to conceive common solutions. In this manner, a rather deep analysis will be made of rules pertaining to the free movement of persons within the Union, and only a very general reference will be made to issues like access to the nationality of each Member State - a matter with European repercussions, yet presently treated at a national level. Admittedly, as European integration progresses, fewer issues remain excluded from the European Union level, subject to the principle of subsidiarity. Yet, as things stand, there are still issues that are discussed more at a national than at European level and the thesis will necessarily reflect this fact.

2 - The Purposes of the Thesis - Legal Issues in the European Union

The objective of this thesis is to examine legal aspects of immigration policy at the level of the European Union to ascertain whether and to what extent current policy is a proper model for the Union.

In my view, the current process of economic and political integration is inconsistent with the present treatment of immigration matters in the European Union. Such matters should be treated to a greater extent at a joint level than they currently are, and within a legal and institutional framework which is more democratic. Moreover, from a substantial perspective, a common immigration policy should be more positive towards third country nationals. Fundamental human rights should be fully respected by any immigration policy and more attention should be given to integrating third country nationals resident in the Union into European society .

These points correspond roughly to the three fundamental types of legal issues that seem to be at stake in the European Union, as far as immigration matters are concerned.

1) The first type of issue relates to competence: whether, and to what extent, immigration matters can and should be addressed by the European Community and the

European Union. Community and Union competence' will be analysed in absolute and in relative terms - in comparison with some other subject matters within European integration with characteristics similar to those of immigration.

2) The second type of issue concerns the institutional structures and working methods with which immigration matters are handled. It is important, for instance, to determine to what extent joint handling of immigration matters includes or excludes the positive (or negative) characteristics of treatment at a national level, notably as far as democratic features of a modern *État de Droit* are concerned.

This second type of issue is, in a way, related to the first. Often, the choice is not between dealing with immigration issues at a national or at a jointly European level, but between different frameworks for dealing with the matters in a joint manner. This is the case for the choice between the framework of the Community and that of intergovernmental cooperation - both on an ad hoc basis and under Title VI of the Treaty on European Union. Both frameworks can be used by Member States to address together the same problems, although there are important differences between them regarding institutional aspects.

3) A third type of issue at stake in the European Union is of a substantive nature: what rules and policies should be adopted and enforced in the sphere of immigration matters. This type of issue can be seen from two fundamental perspectives, to some extent interconnected. One relates to the pursuit of the public good (including social cohesion in the European Union and its position within world relations). The other concerns the individual and collective interests of third country nationals. Respect for the latter's fundamental human rights is, arguably, as much a matter of the common interest of the European Union, as a democratic society, as it is of the third country nationals themselves.

It is important to be aware of how closely these three types of issue are related. In some cases, this classification can be somewhat arbitrary, and in other cases the different types of issue correspond to no more than different aspects of the same basic problems. However, it was thought useful to highlight here such different aspects.

The next subsection will explain the structure adopted in this thesis in order to analyse these three types of legal issue. It will also refer in more detail to the issues at stake in European Union Law.

3 - Presentation of the Plan of the Thesis

a) General Structure and its Justification

This thesis is divided into two main parts, to which the present chapter is a general introduction and following which a final chapter draws the conclusions.

Part I deals with European Community Law and Part II with the formation of a European Immigration Policy, notably in the framework of intergovernmental cooperation (on an ad hoc basis and under Title VI of the TEU).

Part I comprises four chapters: chapter 2, on Community competence; chapter 3, on Article 7A of the EC Treaty (establishment of the internal market by 1993); chapter 4, on Community rules relevant for third country nationals, notably on free movement of

persons; and chapter 5, on the status of third country nationals under Community Agreements with Third Countries.

Part II is made up of three chapters: chapter 6, on early intergovernmental cooperation; chapter 7, on the legal and institutional framework introduced by the Treaty on European Union; and chapter 8, on immigration policy (control of external borders, action against illegal immigration and admission of third country nationals to a Member State).

This division of subject matters between the two parts is justified on several grounds, but it is not meant to be very strict.

First, it has a chronological justification. Initially, immigration matters were dealt with either by the Community or by the Member States acting individually. Fundamental common discussions on immigration matters were conducted within the framework or against the background of Community Law. At that time, the joint treatment of immigration matters almost did not exist and each Member State pursued its immigration policy in a quite distinct manner. But then came the Single European Act, with its objective of establishing an internal market comprising an "area without internal frontiers". This re-launched the debate on whether there should be some joint treatment of immigration matters. For some time this problem was still discussed within Community Law, or in relation to it. This is analysed in Part I.

A second phase developed in the final period of the countdown to 1993, the deadline for the establishment of the internal market. A joint Immigration Policy began to be formed within the framework of ad hoc intergovernmental cooperation. Later it was developed under the new institutional and legal framework created by the Treaty on European Union, which formalised that cooperation. Immigration policy in the new framework is mainly dealt with under Title VI, on Cooperation on Justice and Home Affairs. A part of immigration policy (certain visa aspects) is also being formed within the European Community, under new explicit competences granted to it by the Treaty on European Union. Part II includes the examination of the institutional rules and structures, as well as activities developed by the three frameworks referred to: ad hoc intergovernmental cooperation; cooperation under Title VI of the Treaty on European Union and the European Community - as far as the new rules and competences introduced by the Treaty on European Union are concerned. Activities of the European Community developed under competences existent before the entry into force of the Treaty on European Union will be analysed in Part I. The subsidiarity principle will also be analysed in Part I. The reason for this lies in the fact that it applies to all Community activities, since it has a wide scope - unlike the new Article 100C, for example, which is analysed in the second part of the thesis in chapter 7.

A second reason for the division of the thesis in these two parts is that it highlights the differences between the two fundamental frameworks for joint handling of immigration matters. The choice between these two frameworks seems to be one of the fundamental topics of the current debate at the level of the European Union.

Thirdly, the criterion for the division has a plain practical function: it was thought to be the best way of grouping the issues to be analysed in this thesis.

The division is not very strict in that subjects examined in one part are clearly related to others examined in the other part and are difficult to separate in a precise manner. That close relation is clear from the point of view of competence, institutional frameworks and substantial rules. Furthermore, it may be noted that, insofar as the division of the thesis follows legal and institutional criteria, it may not correspond to a proper classification of the relevant substantial issues. In this manner, the abolition of border controls, for example, is analysed both in Part I, in the context of establishment of the internal market, and in Part II, in the context of intergovernmental cooperation activities.

Two final notes have to be made.

The first concerns the references made in this thesis to "Community" and "Union". Except when otherwise stated (or clear from the context), reference to "Community" means the "European Community" as established by the Treaty of Rome - which was called "European Economic Community" before its name was changed by the Treaty on European Union.[3] The references to *Union* relate to the "European Union" created precisely by the Treaty on European Union. In principle, this reference is meant to comprise all the three "pillars" of the Union. The "first pillar" corresponds to the European Communities (including the "European Community", the "European Coal and Steel Community" and the "European Atomic Energy Community"); the "second pillar" to the "Common Foreign and Security Policy"; and the "third pillar" to the "Cooperation in the Fields of Justice and Home Affairs".[4] When the expressions *Community* and *Union* are mentioned together that is usually meant to highlight the distinction between, the European Community, on one hand, and "Cooperation in the Fields of Justice and Home Affairs", on the other hand. The expressions *Union* or *European Union* may also be used as general terms to refer to all Member States as a whole, as opposed to third countries, to an individual Member State, or to some of the Member States only.

Secondly, it should be noted that this thesis is updated as to December 1995. However, as far as the jurisprudence of the Strasbourg Commission and Court of Human Rights is concerned, this thesis is updated only as to 1 November 1995. Moreover, as far as visas are concerned, the analysis undertaken in chapter 8 is updated only as to 24 September 1995.

Next, the content and purposes of each chapter will be explained.

b) The Content of the Chapters

Besides the introduction to the thesis provided in the present section, Chapter 1 contains also section B. This puts into an international legal context the European legal issues on immigration matters. It deals with the most important rules of Public

[3] Occasionally, the allusion to the EEC Treaty may be used to refer to the version of the EC Treaty previous to the Treaty on European Union.

[4] The "Common Foreign and Security Policy" and "Cooperation in the Fields of Justice and Home Affairs" were established by Title V and Title VI, respectively, of the Treaty on European Union.

International Law regarding immigration. A survey will be made of international conventions adopted by the United Nations, by the International Labour Organisation, and by the Council of Europe - with particular attention being given to the European Convention of Human Rights.

Then the thesis goes on to Part I - on European Community Law.

Chapter 2 deals with Community competence on immigration matters. Its aim is to challenge the conventional idea that the Community does not have competence to deal with issues concerning third country nationals. The chapter will examine the scope for the Community to adopt legal measures exclusively or primarily related to them.

Section A investigates which EC Treaty provisions could form the basis for a specific and explicit Community competence to adopt measures on third country nationals. Section B seeks to determine the relation of issues concerning third country nationals to the achievement of Community objectives. That relation will be examined in the light, first, of the original version of the EEC Treaty; secondly, of the objective of establishing a single market "without internal frontiers" (provided by the Single European Act in Article 7A of the EC Treaty); and, thirdly, of the changes brought by the Treaty on European Union. Section C analyses the relevance of the subsidiarity principle to the legal justification for adopting EC measures on third country nationals. Section D examines EC Treaty provisions for adopting measures of narrow scope concerning third country nationals, giving particular attention to Article 118 and the case Germany et al v. Commission.[5] Section F deals instead with EC Treaty procedures which could form the basis for adoption of measures of general scope concerning third country nationals. Articles 100 and 235 of the EC Treaty will be examined with that aim. The use of these provisions is analysed also in comparative terms, in relation to other areas marginal to the process of economic integration, and concerning which the competence of the Community was not explicitly provided for in the EC Treaty. The legal congruity of the use of that Article in some areas and not in others (e.g. as far as third country nationals are concerned) will be questioned. Finally, section F of chapter 2 examines also Article 238 and the Community external competence to act on the legal status of third country nationals in Member States.

Chapter 3 will analyse Article 7A of the EC Treaty. It will attempt to interpret it, notably by determining its precise legal effects and by discussing the remedies for its violation. While chapter 2 examines how Article 7A could justify the possibility of adopting measures on immigration matters, chapter 3 analyses whether and to what extent Article 7A imposes a legal duty on the Community to adopt such measures - in so far as that is necessary for the establishment of the internal market. This analysis concentrates on the duty of EC institutions to adopt measures to abolish internal border controls on persons - including controls on third country nationals travelling among Member States. This point is relevant for this thesis, since it highlights the relation between matters concerning third country nationals and the establishment of an essential part of the internal

[5] Joined cases 281, 283 to 285 & 287/85, Germany, Netherlands, France, United Kingdom & Denmark v. Commission [1987] ECR 3203.

market. This is an interesting example of the place of matters concerning third country nationals within general EC integration.

Section A will examine the legal content of the "internal market" concept. This concept will be compared with the original concept of a "common market". Then, an attempt will be made to determine what the establishment of an "internal market" requires. An important topic in this respect is whether or not the persistence of controls on persons at the internal borders can be reconciled with the existence of an internal market "without internal frontiers". It is argued that internal border controls on persons within the Community violate Article 7A of the EC Treaty - at least without special justifications of a temporary nature.

Section B examines the legal effects of Article 7A, considering the legal remedies available in case of its violation, inasmuch as internal border controls on persons were not entirely abolished by the end of 1992. First, Article 7A is analysed to ascertain whether or not it contains the required conditions for it to have direct effect in this respect. Secondly, the possibility that Article 7A may have indirect effect is explored. Thirdly, this section will examine the possibility of bringing a successful action against the EC institutions for failing to abolish internal border controls on persons. In this context, reference is made to the action in which the European Parliament complained to the Court of Justice that the Commission had not "put forward the necessary proposals to facilitate achieving freedom of movement for persons".[6] Some ideas are explored on what could be the future judgment of the Court on the case. Finally, for the sake of completeness, reference is also made to an eventual non-contractual liability of the Community for violation of Article 7A.

Section C deals with the declarations annexed to the Single European Act. Their legal value, for purposes of the interpretation of Article 7A, will be analysed. To this end the declarations are examined in the light of the International Law of the Treaties, Community Law and national Law.

Chapter 2 and 3, in one way or another, deal with issues of competence. Chapter 4 and 5 concentrate, instead, on substantive Community Law. Chapter 4 analyses the relevance for third country nationals of rules of the Community elaborated within its internal decision-making process. Chapter 5 analyses the legal status of third country nationals under Agreements concluded by the Community with third countries.

Chapter 4 concentrates on the analysis of the position of third country nationals in the area of free movement within the Community. It also refers to EC legislation in the social area and on education. The objective of chapter 4 it to argue that third country nationals' resident in a Member State should benefit from all the Community rights of free movement - namely from the right to move to another Member State to work and reside therein.

Section A of chapter 4 examines Community Law on free movement from the point of view of the rights assigned to third country nationals irrespective of any relationship with a national of a Member State. This section analyses the legal situation of

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[6] Case C-445/93, Parliament v. Commission, for the abstract of the application of the Parliament see OJ C 1/12 of 4/1/1994. The written phase of the case is already concluded, but as to 15/2/1995 there was, yet, no date set for the oral hearing.

third country nationals in the framework of each of the four fundamental freedoms of movement. The section starts by highlighting the difference between the legal position of nationals of a Member State and that of resident third country nationals concerning their movements within the Community. Then the section refers specifically to the freedom of movement of workers. Article 48 of the EC Treaty is examined in detail to determine whether third country nationals residing in the Union should enjoy the right to free movement as workers. This part of the section will also examine two other topics: the particular situation of refugees concerning the EC right to free movement of workers, and the so-called principle of "Community preference" in the access to the labour market of Member States. Later, section A proceeds to analyse EC rules on freedom of establishment, and free movement of services, capital and goods. The analysis of EC rules on free movement of services will deal also with the situation of third country nationals working in a Member State as providers of services of an enterprise established in another Member State. Section A will also examine the Commission proposals of July 1995 on the right of third country nationals to travel within the Community.

Section B analyses the rights granted to third country nationals by Community Law on free movement of persons due to their family relationship with migrant nationals of a Member State. These rights are subordinate rights, granted only to allow those third country nationals to accompany a migrant national of a Member State, who exercises his or her right to free movement. This situation raises the issue of reverse discrimination, which will be examined. Then, after a summary of such subordinate rights, the section concentrates on the right of residence of the third country national spouse of a migrant national of a Member State. Two situations are analysed in this context: that of the divorced spouse of the worker and that of the worker's partner (within an unmarried couple). Their situations are examined both in the light of Community Law in general, and in the light of the European Convention of Human Rights.

Section C of chapter 4 deals with the personal scope of Community Law on matters not related to freedom of movement. Legislation on social affairs and on education is the object of particular attention.

Chapter 5 deals with agreements concluded by the Community with third countries containing rules on the legal status of nationals of the latter in the European Union. This is one fundamental part of EC Law concerning third country nationals' resident in the Union.

Section A of this chapter makes an overview of the several agreements, including the Association Agreement with Turkey, the Cooperation Agreements with the Maghreb countries, the Agreement on the European Economic Area, the "Europe Agreements" with Central and Eastern European Countries, and the Agreements on Partnership and Cooperation with some countries of the ex-Soviet Union.

Section B examines specific issues in the content of these agreements and refers to some legal problems regarding the interpretation of their rules. First, the rights of workers and their families will receive particular attention. In this context the section will examine rules concerning the right to work and reside in a Member State, the prohibition of discrimination against the workers on the grounds of nationality, educational rights, and social security. Particular attention will be paid to the rights of Turkish nationals to work and reside in a Member State. The Demirel and Bozkurt cases will be analysed. This

analysis will concentrate on the fundamental human rights at stake in those cases - notably as far as those human rights are related to the scope of Community Law and as far as the (non)review by the Court of Justice of their protection is concerned. Secondly, this section deals also with Agreements' rules on freedom of establishment and provision of services. Thirdly, common and final rules of the agreements will be examined - including rules on limitations to the rights provided by the agreements and rules on cooperation with the Community.

Part II of the thesis examines the formation of a European Immigration Policy.

Chapter 6 deals with the early intergovernmental cooperation that took place, which was developed on an ad hoc basis before the entry into force of the Treaty on European Union (and afterwards in the case of Schengen). Section A refers to general legal issues raised by such cooperation: the relationship between its activities and Community competence, as well as the relationship between the substantive rules of Community Law and rules enacted in the intergovernmental framework. Section B examines the different intergovernmental groups dealing with third country nationals and, in a more general manner, with the abolition of internal border controls between Member States. The structures and activities of such groups will be examined, with particular reference to the TREVI Group, the Ad Hoc Working Group on Immigration, and the Schengen Group. The activities of these groups will be assessed to see how efficient they were and to examine the democratic character of their working methods.

Chapter 7 analyses the new legal and institutional framework introduced by the Treaty on European Union, as far as third country nationals are concerned. Section A provides a historical introduction to the Treaty. Then, section B analyses the provisions of Title VI of that Treaty, on "Cooperation in the fields of Justice and Home Affairs". This is the so-called "third pillar" of the Union, the predominant framework for dealing with issues concerning third country nationals.

First, section B refers to the scope of the activities to be developed under Title VI. Then, it deals with the activities to be developed and the decision making-process to be used under the same Title. This part will examine the legal nature of the instruments to be adopted, the procedures to be used (and the position of the different institutions therein), and the extent to which this framework is transparent in its functioning. A third part of this section concerns respect for fundamental human rights and the Member States' responsibilities on "internal security". These are legal limits established by the Treaty on European Union to the activities developed under its Title VI. Subsequently, this section deals with the lack of a uniform judicial control over the activities undertaken and instruments adopted under Title VI. A fifth part of this section refers to the intermediate structure of decision making and law enforcement of Title VI. Following this, the relations between Title VI and the European Community will be analysed. A seventh part deals with Article K.7 and the relations between Cooperation developed under Title VI and other types of intergovernmental cooperation. Finally, a general assessment of Title VI will be made.

Section C of chapter 7 deals with amendments made by the Treaty on European Union to the Treaty of Rome, which are of relevance for third country nationals. It

concentrates on the analysis of Article 100C, on visas, and its material scope. Section C deals also with the Protocol and Agreement on Social Policy, and with the EC Treaty provisions establishing the Union Citizenship.

Chapter 8 deals with a number of legal issues regarding immigration policy, i.e. the regulation of entry of third country nationals into the European Union and their circulation within it. It deals, first, with the control of external frontiers of the Union, secondly, with the admission of immigrants to a Member State, and, thirdly, with action against illegal immigration. These issues will be analysed taking into account mostly the activities of intergovernmental cooperation between Member States, developed both before the entry into force of the Treaty on European Union (on an ad hoc basis), and after it (within the framework of Title VI).

Section A looks at the control of external frontiers. It examines, first, the Commission draft Convention on External Frontiers and, secondly, the rules on visas - including the rules on visas of the draft Convention and of the recently adopted EC instruments on the matter. This section starts by making a general survey of the rules of the draft Convention on the Crossing of the External Frontiers of the Member States. Special attention is given to the legal status under the Convention of third country nationals living in a Member State, to the exchange of information within the Convention framework, and to the proposed jurisdiction of the Court of Justice on the Convention. As far as visas are concerned, this section analyses the relevant rules contained in the draft Convention. It also analyses the rules on visas contained in Community instruments already adopted under Article 100C of the EC Treaty - i.e. in the Regulation laying down a uniform format for visas and in the Regulation determining the third countries whose nationals have to hold a visa to enter into the Union.

Section B of chapter 8 examines the resolutions on admission of immigrants to a Member State. First, it examines common aspects of such resolutions. Secondly, it deals separately with the resolution on admission for employment, with the resolution on admission for pursuing activities as self-employed persons and the resolution on admission for study purposes. Finally, particular examination will be made of the resolution on admission for the purposes of family reunification, approved in June 1993 by the ministerial meeting of the Ad Hoc Working Group on Immigration. Reference will also be made to relevant rules in this domain of international legal instruments.

Section C of chapter 8 deals with action against illegal immigration into the Union. It surveys of the relevant resolutions of the Council, concentrating on the internal and external aspects of the expulsion of illegal immigrants. As far as the external aspects are concerned, it refers to readmission agreements with third countries, including the so-called "parallel Conventions" to the External Frontiers Convention and to the Dublin Convention.

Finally, chapter 9 submits the conclusions of the thesis.

As mentioned above, this thesis analyses issues in EC and European Union Law related to immigration from third countries and to third country nationals living in the

Member States. Issues concerning immigration and foreigners' rights are often quite complex. In addition, the treatment of these issues at the European level, as far as third country nationals are concerned, is relatively recent. Thus legal study of immigration issues and of their treatment by the European Union is still in a relatively undeveloped condition. More work is called for than has so far been done.

This is my contribution.

B) THE INTERNATIONAL LEGAL CONTEXT : A REVIEW OF UN, ILO AND COUNCIL OF EUROPE CONVENTIONS RELEVANT FOR THE LEGAL STATUS OF THIRD COUNTRY NATIONALS IN THE EUROPEAN UNION

This section deals with rules of Public International Law relevant for third country nationals in the Member States of the European Union.[7] It makes an overview of some of the most important multilateral treaties on the matter - namely those adopted in the framework of the United Nations, International Labour Organisation and the Council of Europe. Instruments approved within the Conference on Security and Co-operation in Europe may also be of relevance for third country nationals in Member States, but they are not legally binding.[8] Therefore, they are not dealt with by this section.

In this section, particular attention will be given to the position of migrant workers and their families. Following the scope of the thesis as explained in the previous section, international instruments regarding, first, racial discrimination, and, secondly, refugees and asylum-seekers, are not mentioned here. Finally, note that section B of chapter 8 deals in further detail with treaties relevant for the family reunification of migrant workers.

1 - United Nations

Several legal instruments adopted under the framework of the United Nations are relevant for the legal position of third country nationals in Member States. Most of those international instruments are of interest for their position simply because, when they grant

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[7] See, generally, Plender, R. *International Migration Law*, 2nd. ed., Dordrecht, Martinus Nijhoff, 1988, at chapters 5, 7, 8, 9, 11, 12 and 13, and the list of treaties relevant for international migration, idem, p. 557. See also Cator, J. & Niessen, J. (eds.), *The use of international conventions to protect the rights of migrants and ethnic minorities*, Strasbourg, CCME, 1994; Capotorti, Francesco (special rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities) *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, Study Series No.5, New York, United Nations, 1991; de Lary de Latour, H. "Le Droit International en Matiére de Migration" in *Les Accords de Schengen - Quelle Politique Migratoire Pour la Communauté?*, Luxembourg, Institut Universitaire International Luxembourg, 1992, pp.63-100, in particular at 78-93; Niessen, Jan "Immigrants and Migrant Workers" in *Economic, Social and Cultural Rights*, by Eide, Asbjørn , Krause, Catarina & Rosas, Allan (eds.), Dordrecht, Martinus Nijhoff, 1995, at 323-340; and Storey, Hugo "International Law and Human Rights Obligations" in *Strangers and Citizens: a positive approach to migrants and refugees*, Spencer, Sarah (ed.), London, Institute for Public Policy Research / Rivers Oram Press, 1994, pp.111-136. Older works are those of Goodwin-Gill, Guy S. *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978; Lillich, R. B. *The Human Rights of Aliens in Contemporary International Law*, Manchester, Manchester University Press, 1984; Nascimbene, Bruno *Il Trattamento dello Straniero nel Diritto Internazionale ed Europeo*, Milan, Giuffrè, 1984; and Weis, P. *Nationality and Statelessness in International Law*, 2nd.ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979. See also the interesting Article by McNamee, B.L. & Terrell, T.P. "Transovereignty: Separating Human Rights from Traditional Sovereignty and the Implications for the Ethics of International Law Practice", *Fordham International Law Journal*, Vol.17, 1994, No.3, p.459.

[8] On instruments adopted within the CSCE process see Gibson, U. & Niessen, J. , *The CSCE and the Protection of the Rights of Migrants, Refugees and Minorities*, CCME Briefing Paper No.11, Brussels, CCME, March 1993.

rights, they do not always distinguish between nationals and non-nationals of a certain State. This is the case, for example, in the Universal Declaration of Human Rights of 1948,[9] the International Covenant on Social and Cultural Rights[10] and the International Covenant on Civil and Political Rights,[11] both from 1966.[12]

The most ambitious treaty adopted within the United Nations and concerning migrant workers is the International Convention on the Protection of All Migrant Workers and Members of Their Families.[13] This Convention was adopted by the General Assembly of the United Nations, in December 1990.[14] It is perhaps the most comprehensive international instrument aiming at the protection of rights of migrant workers and members of their families.[15] It deals with their civil, political, economic, social and cultural rights. The Convention has two aims. One is to establish and reaffirm that all migrant workers enjoy a common core of human rights. The other is to diminish the flow of illegal workers. The drafters had the view that only by providing a common group of rights to legal and illegal workers could illegal immigration be discouraged and legal immigration supported.

In this way, Part III of the Convention establishes the principle of non-discrimination between all migrant workers and worker nationals of the host country. This non-discrimination principle applies to legal and illegal workers, whatever their nationality. The material scope of the equality principle includes issues related to detention and imprisonment, courts and tribunals, social security, emergency medical care, education, and also remuneration and conditions of employment - such as working hours, overtime, weekly rest and paid holidays, health and safety, minimum age of employment, restriction on home work and termination of employment. All migrant workers are also recognised to have the right to join trade unions.

Additional rights are granted in Part IV of the Convention to regular migrant workers and members of their families, whatever their nationality. They can also benefit from equality of treatment with nationals in relation to a further range of rights, including taxation, the exercise of a remunerated activity, protection against dismissal, unemployment benefits, access to placement services, vocational training, housing, social and health services, and cultural life. In case of unemployment, protection is provided against expulsion from the host country before expiration of the residence permit. States

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[9] See, e.g., its Articles 2, 9, 10, 12, 13(1) and 16.

[10] UNTS, Vol. 993, p.3. It was ratified by 131 States, including all Member States.

[11] UNTS, Vol. 999, p.171. See its Articles 12 and 13. This Covenant was ratified by 129 States. Among the Member States only Greece has not ratified it.

[12] See also the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by Resolution of the General Assembly of 18 December 1992, see *HRLJ*, Vol.14, 1993, No.1-2, pp.54-6.

[13] For a detailed analysis of the Convention see Hune, Shirley "Equality of Treatment and the International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families", in *The use of international conventions*, op. cit., at p. 79-92; and Hune, S., Niessen, J. & Taran, P. *Proclaiming migrants' rights: the new international Convention on the protection of the rights of all migrant workers and members of their families*, CCME Briefing Paper No. 3, Brussels, CCME, March 1991.

[14] United Nations G.A. Res. 45/158. This Convention was adopted without a vote.

[15] Niessen, J. "Immigrants and Migrant Workers", op. cit., at p. 324.

parties are also bound to take measures to facilitate family reunification with spouses and children of regular foreign workers.

To ensure its enforcement, the Convention provides for the creation of a special committee, composed of 14 independent experts and one observer from the ILO, who are to receive and analyse national reports submitted by States parties. The Convention provides also, on a optional basis, for inter-state and individual complaints to the same Committee.

This Convention is not yet in force. It needs twenty ratifications to enter into force, and only Egypt, Morocco and Seychelles have yet ratified it.[16] In the European Union, the Commission[17] invited Member States to ratify this Convention, but with no results until now. This is certainly explained by the ambitious character of the Convention. Some States refused from the beginning to accept a Convention that would apply also to illegal immigrants.

2 - International Labour Organisation[18]

Several ILO Conventions also have some relevance for the legal position of migrant workers and, in general, for the legal status of third country nationals in the Member States. In some cases, ILO Conventions provide for rights which apply also to migrant workers and their families, and in other cases, although the Conventions are not exclusively about migrant workers, they contain provisions dealing specifically with their situation.[19]

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[16] As of 1 January 1995. Unless otherwise stated, when mention is made in this section to States ratification or signature of a Convention, such mention relates to this date. Note, in the meantime, that Mexico, Chile and the Philippines have also signed the Convention, but have not yet ratified it.

[17] Communication on Immigration and Asylum Policy of 1994, COM (94) 23 final, point 22, p. 43.

[18] See, e.g., Böhning, W.R. "International Contract Migration in the Light of ILO Instruments", chapter 10 of his *Studies in International Labour Migration*, London, Macmillan, 1984, pp. 233-261; and Trebilcock, Anne M. "Migrant Workers: An Overview of International Labour Standards", in *The Legal Position of Aliens in National and International Law*, Vol.2, Frowein, J. A. & Stein,T. (eds.), Berlin, Max Planck Institut/Springer Verlag, 1987, pp.1827-1850.

[19] See, for both types of situations, for example, Articles 10 to 13 of ILO Convention No.82 concerning social policy on non-metropolitan territories, of 1947, UNTS, Vol.218, p.345; Articles 1, 6 to 9 and 14 of ILO Convention No.117 concerning basic aims and standards of social policy, of 1962, UNTS, Vol.494, p.249 (ratified by 31 States, including the following Member States: Italy, Portugal, and Spain); Articles 3 to 7 and 10 of ILO Convention No.118 concerning equality of treatment in social security, of 1962, UNTS, Vol.494, p.271 (in this Convention, unlikely in other ILO Conventions, the equality principle applies on the basis of reciprocity, except for stateless persons and refugees; the Convention was ratified by 37 States, including Turkey and the following Member States: Denmark, Finland, France, Germany, Ireland, Italy, and Netherlands); and Articles 3, 6, 9 and 10 of ILO Convention No.157 concerning maintenance of social security rights, of 1982, ILO Official Bulletin, 1982, Ser.A No.2, p.61 (ratified only by 2 Member States: Spain and Sweden). Note also that the International Labour Office was the sponsor of a European Agreement concerning the provision of medical care to persons during temporary residence, of October 1980, *ILM*, Vol.22, p.553 (in force only in 7 States: Finland, Germany, Italy and Sweden, as well as in Norway and Hungary). A further arrangement for the application of this Agreement was concluded on 26 May 1988, in the framework of the Council of Europe, but was not yet ratified by any State, ETS, No.129. The information of this footnote is updated at least as to 1 January 1993.

The ILO Conventions most relevant for the position of migrant workers are the ILO Convention No.97 of July 1949 concerning Migrant Workers[20] and ILO Convention No.143 of June 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.[21] Unlike most Conventions concluded within the Council of Europe, both these ILO Conventions apply to migrant workers irrespective of their nationality, and whether or not their countries of origin have ratified them.

ILO Convention No.97 is the successor of a Migration for Employment Convention which was approved in 1939 in the International Labour Conference, but which never obtained sufficient ratifications to enter into force. The Convention No.97 establishes the principle of non-discrimination between migrant workers and worker nationals of the host country, as far as certain labour rules and some aspects of social security are concerned. According to its Article 6, equality is to be applied, inter alia, in what relates to remuneration, family allowances, working hours, holidays, minimum age for employment, membership of trade unions and employment taxes, as well as to dues and contributions payable in respect of persons employed. The Convention protects also the stability of the residence status of workers and their family in the event of injuries sustained or illnesses contracted after the entry in the host country.[22] Nevertheless, the Convention applies only to workers legally admitted to work in the territory of the contracting parties.[23]

ILO Convention No.143 provides for action against illegal migration and expands the principle of equal treatment included in Convention No.97.

As far as the latter expansion is concerned, like in Convention No.97, in Convention No.143 the rights of equality of treatment apply only to workers and their relatives, provided they are legally residing in the territory of the host country.[24] In this respect, the Contracting Parties commit themselves to establish a policy aimed at promoting and guaranteeing to migrant workers and to members of their families:

> "equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons".[25]

National governments are, for example, required to

> "take all steps to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue".[26]

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[20] UNTS, Vol. 120, p.71. It was ratified by 40 States, including 8 Member States: Belgium, France, Germany, Italy, Netherlands, Portugal, Spain, and the United Kingdom.

[21] ILO Official Bulletin, vol. LVIII, 1975, Ser.A., No.1, pp.36-43. It was ratified by 17 States, including the following Member States: Italy, Portugal and Sweden.

[22] Article 8(1). See, however, Article 8(2), providing that, if a worker is admitted on a permanent basis to one country, the authorities of the latter can demand a minimum period of residence to provide him the protection envisaged in Article 8(1). In any case, that period cannot exceed five years from the date of admission of the worker. See also the reference to this Article made in chapter 5, on the Bozkurt case.

[23] Article 11.

[24] Article 10, in fine, and Article 11. Emphasis added.

[25] Article 10.

[26] Article 12 (g).

A difference in tone may be noted in Article 13 of the Convention, providing that a "Member may take all measures which fall within its competence (...) to facilitate the reunification of the families of all migrant workers legally residing in the territory". The families include the worker's "spouse and dependent children, father and mother".[27]

As far as illegal migration is concerned, Convention No.143 provides for the detection, suppression and repression of clandestine movements of migrants seeking employment and of their actual illegal employment. Contracting Parties are required to adopt legislation providing for administrative, civil and penal sanctions ("which include imprisonment in their range") to persons who organise or knowingly assist illegal movement of migrants for employment, or who employ them.[28] On the other hand, Convention No.143 contains no provision for the sanctioning of illegal migrants.

On the contrary, some protection is even provided for them. Article 1 of Convention No.143 provides that each Party "undertakes to respect the basic human rights of all migrant workers". An interesting protection is provided by its Article 9 to the rights of migrant workers whose entry in the country, or employment therein, violated the relevant migration or labour rules. If their position cannot be regularised, they nevertheless "shall enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits." Workers are also granted the right to present their case to a competent body in case of dispute on these rights. Moreover, it may be noted that the Convention provides also that, if a migrant worker is legally resident in the territory for the purposes of employment, he or she shall not be considered to be in an illegal situation due to the mere fact that he or she lost employment. Such loss of employment shall not in itself imply the withdrawal of his authorisation of residence.[29]

Note that the ILO has also adopted some recommendations concerning migrant workers, although these do not have binding effect.[30]

Finally, the system of supervision of the implementation of ILO Conventions is based on governmental reports and on complaints and representations presented to ILO organs, the examination of which is mainly made by independent groups of experts.[31]

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[27] Article 13(2).

[28] Articles 2, 5 and 6.

[29] Article 8. This right is less restrictive than that provided in Article 8 (1) of Convention No. 97, notably because the rule of Article 8(2) of Convention No.97 does not exist in Article 8 of Convention No.143.

[30] See Recommendation No.86 concerning migration for employment (revised) of 1949, including a model agreement on temporary and permanent migration; and Recommendation No.151 concerning migrant workers, of 1975. See also Recommendation No.166 concerning protection against and in case of termination of employment, of 1982.

[31] Regular reports are made by governments, which copies are requested to be sent to the national organisations of employers and workers, the governments being obliged to inform the ILO of their comments. The reports are examined by an independent Committee of Experts, appointed by the ILO Governing Body, on a proposal of the Director General of the ILO. Complaints can be initiated by States or by the ILO governing body of its own motion or on receipt of a complaint from a delegate to the ILO Conference. The complaints are examined by independent Commissions of Inquiry appointed by the governing body of the ILO. The conclusions of these commissions are legally binding, although they may be subject of an appeal to the International Court of Justice. Finally, representations can be presented by organisations of employers or workers and are examined by a tripartite Committee of the Governing Body of the ILO, and then by the Governing Body itself. For more details on the ILO system of supervision see

3 - Council of Europe[32]

a) The European Convention of Human Rights[33]

The European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter E.C.H.R.], concluded on 4 November 1950, is probably the most important international instrument for the protection of human rights in Europe.[34] The Convention protects only a group of basic human rights and its main concern is not the protection of immigrants as such. Nevertheless, the Convention is of interest for the legal position of third country nationals in Member States.

First, its Article 1 provides that Contracting States have to secure the rights and freedoms established in the Convention to "everyone within their jurisdiction".[35] Therefore, in the jurisdiction of a Contracting State, as far as the rights of the Convention are concerned, aliens are to be protected in the same way as nationals of that State. This protection is granted regardless of whether those aliens are or not nationals of another Contracting Party to the Convention. The rights granted by the Convention can be enjoyed by all third country nationals in all Member States of the European Union. All Member States ratified the Convention, allowed for individual complaints and recognised as compulsory the jurisdiction of the European Court of Human Rights.

Secondly, although the Convention is not addressed to immigrants as such, it can have concrete interest for their position. The Commission and the Court of Human Rights

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Valticos, N. "Once More About the ILO System of Supervision: In What Respect is it Still a Model?" in *Towards More Effective Supervision by International Organisations - Essays in Honour of Henry G. Schermers*, vol. I, Muller, Sam & Blokker, Niels (eds.), Dordrecht, Martinus Nijhoff, 1994, pp.99-113.

[32] For a general overview of the activities of the Council of Europe in the field of migration see Niessen, Jan & Murray, John *The Council of Europe and Migration*, CCME Briefing Paper No.6, Brussels, CCME, December 1991. As far as the Conventions adopted in the framework of the Council of Europe are concerned, see generally Plender, R. , op. cit., chapter 7. See also Gomien, Donna "The Rights of Minorities under the European Convention on Human Rights and the European Charter on Regional and Minority Languages", in *The use of international conventions...*", Cator, J. & Niessen, J. (eds.) Strasbourg, CCME, 1994, at pp.49-72; Murray, J. & Niessen, J. *The Council of Europe and the protection of the rights of migrants, refugees and minorities*, CCME Briefing Paper No.13, Brussels, CCME, September 1993; and *Human Rights of Aliens in Europe*, Proceedings of the Colloquy on Human Rights of Aliens in Europe, Funchal-Madeira, 1983, Council of Europe Directorate of Human Rights; Dordrecht, Martinus Nijhoff, 1985.

[33] ETS, No.5. It was ratified by 31 States: including Turkey, all Member States, and Cyprus, the Czech Republic, Hungary, Iceland, Norway, Poland, Romania, Slovakia, Slovenia, and Switzerland. On the E.C.H.R. and aliens see, e.g., Drzemczewski, A. *The position of aliens in relation to the European Convention of Human Rights*, Strasbourg, Council of Europe - Directorate of Human Rights, 1985; Mackintosh, K. , Peers, A. , Mole, N. , Guild, E. & Duffy, P. *The European Court of Human Rights and UK Immigration and Asylum Law - An Analysis of Implementation*, London, ILPA, July 1993; Salvia, Michele "Nazionalità in senso formale e nazionalità in senso sostanziale nella Convenzione europea dei diritti dell'uomo", *Rivista internazionale dei diritti dell'uomo*, Vol. VIII, 1995, No.1, pp.9-22.

[34] At least apart from Community Law.

[35] However, application of the Convention to non-metropolitan territories, requires an explicit declaration to that effect, according to Article 63 (1).

of Strasbourg[36] have held that the right to reside or to enter a Contracting Party, as well as the right of asylum and the freedom of expulsion, are not, as such, protected by the Convention. However, they have also considered that migration measures adopted by a Contracting State may put at stake certain rights protected by the Convention.[37]

Thirdly, the Convention is also relevant within the framework of Community and Union Law, themselves. As far as Community Law is concerned, the Court of Justice of the European Communities has repeatedly declared that "fundamental human rights form an integral part of the general principles of Community Law".[38] Moreover, the Court has already stated that:

> "International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community Law"[39]

The European Convention of Human Rights being one of such treaties, the Court has often used the Convention as a standard to review the legality of acts under the scope of Community Law.[40] Meanwhile, recently, Article F of the Treaty on European Union established that:

> "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (...) and as result from the constitutional traditions common to the Member States, as general principles of Community Law."

Thus, there is a strong case to sustain that the Law of the European Union, including Community Law, is subject to the rules of the E.C.H.R.

Last, but not at all least, the E.C.H.R. has one of the more effective systems of enforcement among international treaties on human rights. Although individual petitions (complaining about the violation of the Convention) can only be presented after the exhaustion of domestic remedies,[41] the decisions of the Court of Human Rights are final and binding on the States.[42]

As mentioned above, under the E.C.H.R. aliens are entitled to the same set of rights as nationals of the Contracting Parties. Nevertheless, their specific position as aliens

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[36] Them, together with the Committee of Ministers of the Council of Europe, are the organs of the Council of Europe with the task of ensuring the observance of the E.C.H.R..

[37] See, e.g., the decision of the Commission of Human Rights of 24/4/1965, in Application No. 1855/63, Yearbook E.C.H.R., Vol.8, p.203; and the European Court of Human Rights in cases Abdulaziz et al., judgment of 28/5/1985, Series A, No. 94, p.67. For the first part of the statement, denying the protection of the right of entry as such, see also application No.16360/90, D&R, No.76-A, 1994, p.13. On the other hand, note application 434/58 X v. Sweden, Yearbook E.C.H.R., Vol.2, 1958-9, p.354. The Commission, in its decision on this application, held that a "State which signs and ratifies the European Convention of Human Rights must be understood as agreeing to restrict the free exercise of its rights under general international law, including the right to control the entry and exit of foreigners to the extent that and within the limits of the obligations which it has accepted under that Convention." Idem, at p.372.

[38] See, for instance, Case 29/69, Stauder [1969] ECR 419; Case 4/73, Nold(II) [1974] ECR 491; Case 44/79, Hauer [1979] ECR 3727 and Case 136/79, National Panasonic [1980] ECR 2033.

[39] Case 4/73, quoted in the preceding note, at para. 13 of the judgment, idem, at p.507.

[40] See, e.g., Case 36/75, Rutili [1975] ECR 1232 and Case 63/83, Kirk, [1984] ECR 2718.

[41] Article 26.

[42] All States that ratified the Convention have by now accepted that the jurisdiction of the European Court of Human Rights is compulsory and that individual complaints can be presented.

makes certain rules of the Convention particularly relevant for them. For aliens the most important rules of the Convention seem to be article 3 (prohibition of torture and inhuman or degrading treatment or punishment), articles 5 and 6 (concerning detention and judicial procedures), article 8 (on respect for private and family life), article 12 (on the right to marry and to found a family) and article 14 (on freedom of discrimination in the enjoyment of the rights set forth in the Convention). As far as protocols to the Convention are concerned, attention should be given to the Fourth[43] and Seventh[44] Protocols. Article 2 of the Fourth Protocol protects free movement within the territory of a State of everyone lawfully present there. Article 4 of the same Protocol prohibits the "collective expulsion of aliens". Meanwhile, Article 1 of the Seventh Protocol gives minimum procedural guarantees to aliens in relation to their expulsion, provided they are lawfully resident in the State.

Here, a brief examination will be made both of the content of these rules and of most important aspect of the case-law on their application to migration cases. The analysis will first, give particular attention to Articles 3 and 8 of the E.C.H.R., and then refer briefly to the other relevant provisions of the Convention and the Protocols to it.

(i) Article 3

This provision states that

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[45]

Besides protecting foreigners in their daily life in Member States, this provision applies to situations regarding specifically their entry into and exit from the territory of a Contracting Party. It applies to migration measures, as regards both the manner in which they are performed and the measures themselves.

Article 3 applies, for example, to the conditions in which the arrest, detention for expulsion and the very expulsion of third country nationals is performed. If they are carried out in a manner that constitute torture or involve inhuman or degrading treatment, they are incompatible with Article 3.[46] This is a very important point, because such types

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[43] ETS, No.46. It was ratified by 23 States, including all Member States except Greece, Spain, and the United Kingdom.

[44] ETS, No.117. It was ratified by 18 States, including the following Member States: Austria, Denmark, Finland, France, Greece, Italy, Luxembourg and Sweden.

[45] See Alleweldt, Ralf "Protection Against Expulsion Under Article 3 of the European Convention on Human Rights", EJIL, Vol.4, 1993, No.3, pp.360-376; and Cassese, A. "Prohibition of Torture and Inhuman or Degrading Treatment or Punishment", in *The European System for the Protection of Human Rights*, Macdonald, R. , Matscher, F. & Petzold, H. (eds.), Dordrecht, Martinus Nijhoff, 1993, pp.225-261. Note also that there are international treaties which have the specific objective of fighting torture and inhuman and degrading treatment. Within the framework of the Council of Europe, on 26 November 1987, was adopted a European Convention for the prevention of torture and inhuman or degrading treatment or punishment, see ETS, No.126. It entered into force on 1 February 1989 and was ratified by 29 States, including all Member States. In the framework of the United Nations was adopted, on 10 December 1984, a Convention against torture and other cruel, inhuman or degrading treatment or punishment, see United Nations, G.A. Res. 39/46, Doc.A/39/51. It entered into force on 26 June 1987 and was ratified by 85 States, including all Member States, except Belgium and Ireland.

[46] Application No. 6242/73, Brückmann v Federal Republic of Germany, D&R, No.6, 1977, p.57.

of situation are more frequent than is generally thought.[47] An interesting example regarding both admission and expulsion is that of the East African cases, in which was at stake not only the effect but also the manner in which a migration measure was taken. The cases concerned a piece of UK immigration law[48] which prevented citizens of the UK and Colonies of Asian origin from entering the UK. These persons had been affected by restrictive immigration laws in Africa and, in some cases, had no other country to which they could go. The Commission of Human Rights found that the substance and effect of the UK immigration law made a discrimination on grounds of colour and race. It considered that "publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity" and "amount to degrading treatment within the meaning of Article 3 of the Convention".[49] The Commission held that Article 3 had actually been violated in the case at stake.[50] However, as the case was not referred to the Court of Strasbourg, it ended up in the Committee of Ministers, where the lack of the required majority of two thirds[51] made it impossible to declare the existence of a violation of the Convention.

In any case, the expulsion or extradition from a country can, in itself, also constitute a violation of Article 3. The Commission of Human Rights has already considered that repeated expulsion of an alien without identity documents, whose country of origin is unknown, may result in a degrading treatment.[52]

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[47] Note, for example, the case of inhuman conditions of detention of foreigners waiting deportation in the "dépot des étrangers", located in the basement of the "Palais de Justice" in Paris. Since 1991 the European Committee for the Prevention of Torture had complained about its inhuman conditions, but these continued for some time, even after French newspapers "Libération" and "Le Monde" denouncing the case in 1993. See the dossier of the Groupe d'Information et de Soutien des Travailleurs Immigrés, "Dépot de Paris - L'Assignation du Préfet de Police", Paris, November 1993. For recent news about the situation in that detention centre see "Le Monde", 28/4/1995, p.13. A significant case is also that of Joy Gardner, a Jamaican woman who in 1993 was visited by three Scotland Yard agents to be arrested for deportation. As she started to cry out the policemen put in her face a big plaster to shut her mouth. Her resistance continued and while a policeman tied her legs, the other policeman sat on her stomach. She was also restrained with a body belt and soon died of suffocation. See by Amnesty International, *United Kingdom: Death in Police Custody of Joy Gardner*, London, August 1995. Apparently, this type of treatment of foreigners is not uncommon in Britain. Another case is that of the death in 1991 of Omasase Lumumba, an Zairian asylum-seeker, while he was being controlled and restrained by prison officers in a strip cell in the United Kingdom. An inquest jury found that he was unlawfully killed by prison officers, but no criminal charges were brought. See Amnesty International, *United Kingdom - Unlawful killing of detained asylum seeker Omasese Lumumba*, November, 1993. Naturally, this and other similar cases of arrest or detention raise the issue of respect not only of Article 3 but also of Article 2 of the E.C.H.R., on the right to life. On cases in the United Kingdom, see also *Charter for Immigration Detainees*, London, Joint Council for the Welfare of Immigrants, 1994, p.3. Naturally, it must not be forgotten that cases of this type exist also in other Member States.

[48] The United Kingdom's Commonwealth Immigrants Act 1968.

[49] Decision of the Commission of 10/10/1970, on the admissibility of applications 4403 et al./70, European Commission of Human Rights Collection of decisions No.36, pp.92-131 at pg.117, or Yearbook E.C.H.R., Vol.13, pp.929-1027, at pg.994.

[50] See the only recently published report of the European Commission of Human Rights in case "East African Asians v. UK", D&R, No.78-A, 1994, p.5, and *HRLJ*, Vol.15, 26/9/1994, No. 4-6, pp.215-232.

[51] Article 32 of the E.C.H.R.

[52] Application No.7612/76, Giama V. Belgium, Yearbook E.C.H.R., Vol.23, 1980, p.428. Note also that in the Nasri case the Commission decided that not only Article 8 but also Article 3 of the E.C.H.R. would

Furthermore, on the basis of case-law of the Commission and Court of Human Rights, it can be argued that Article 3 is also violated when there are good reasons to believe that there is a real risk in the State to which the person will be sent that such person be subject to the treatment defined by Article 3.[53] This treatment may be imposed either by public authorities or by private entities.[54] According to what seems to be the broadest formulation ever made by the Commission in this respect:

> "the deportation of a foreigner to a particular country might in exceptional circumstances give rise to the question whether there had been 'inhuman treatment' within the meaning of Article 3 of the Convention" and "similar considerations might apply to cases where a person is extradited to a particular country in which due to the very nature of that country, basic human rights, such as are guaranteed by the Convention, might be either grossly violated or entirely suppressed(...)".[55]

In this respect the leading case is that of Soering,[56] which was the first case in which a possible extradition was considered to be in violation of the Convention.[57] The case concerned a decision to extradite a German citizen to Virginia, in the U.S.A.. There, he would face trial on a charge of murder[58] and could be condemned to death. The Commission decided, by six votes to five, that such extradition would not constitute a violation of Article 3 of the Convention. However, the Court of Strasbourg unanimously considered that in the circumstances of the case his extradition would violate that

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be violated if a deaf-mute Algerian national, who had lived in France with his family since he was four, was expelled from that country to Algeria. The Commission considered that in view of his handicap and his dependency of his family, his expulsion would constitute inhuman and degrading treatment, besides an unjustified interference with the exercise of his right to respect for his family life, thus violating also Article 8. See Application No.19465/92, Nasri v. France, report of the Commission of 10/3/1994, in Council of Europe *Information Sheet-human rights*, No.34, January-June 1993, Strasbourg 1994, p.72. As will be explained below, when examining Article 8, the Court of Human Rights ruled that in this case the France had violated Article 8 of the E.C.H.R. Thus the Court considered that it was not necessary to examine the complaint that his eventual expulsion would violate Article 3 of the Convention. See paragraphs 46 and 47 of the judgment of the Court of 13/7/1995, Series A, Vol.322-B.

[53] An extradition to a country leading to a serious risk of a person being condemned to the death penalty and executed, arises the application of Article 1 of the Sixth Protocol to the E.C.H.R., concerning the abolition of the death penalty, of 1983, ETS, No.114. See Application No.22742/93, Joy Aylor-Davis v. France, which admissibility was decided by the Commission on 20/1/1994, D&R, No.76-A, 1994, p.165, at p.170. Protocol No.6 was ratified by 23 States, including all Member States, except Belgium, Greece and the United Kingdom.

[54] Application No. 10040/82, X v. Federal Republic of Germany, not published. Here the Commission considered that "it is not necessary for the application of article 3 that the danger emanates from the Government of the State, which requires extradition" (emphasis added). See also pointing in the same direction the Commission's decision in Application No.10308/83, Altun v. Federal Republic of Germany, D&R, No.36, 1984, p.209, at 232, paragraph 5 of the final part of the decision.

[55] See Commission's decision on the admissibility of Application No.1802/63, X v. Federal Republic of Germany, Yearbook E.C.H.R., Vol. 6, 1963, p.462, at 480.

[56] Case Soering v. United Kingdom, judgment of the Court of 7/7/1989, Series A, No. 161.

[57] Note, however, the friendly settlement between the government of the United Kingdom and the widow of a Moroccan pilot. The UK extradited the pilot to Morocco after he had participated in a failed *coup d'état* against the King of that country. Soon after his extradition he was summarily judged and executed. See Application No. 5961/72, Yearbook E.C.H.R., Vol. 16, 1973, p. 357.

[58] He had killed his girlfriend' parents by repeatedly stabbing them in the neck, throat and body, "because" they were opposed to his relationship with their daughter.

provision. The Court gave particular relevance to the following points. First, the Court concluded that Mr.Soering would run a "real risk of being sentenced to death in Virginia".[59] There, he would be subject to the "death row phenomenon". He would most likely spend 6 to 8 years waiting for a final decision on his punishment, while enduring anguish and mounting tension, as well as the severity of the special custodial regime on death row. Moreover, the Court took into consideration the personal circumstances of Mr. Soering, namely the fact that when he committed the crime he was only 18 years old and that he was considered to be at that time in a disturbed mental state.[60] Therefore, the Court held that his extradition would "expose him to a real risk of treatment going beyond the threshold set by Article 3." Consequently, the decision to extradite him "would, if implemented, give rise to a breach of Article 3."[61]

A similar reasoning has been applied by the Court regarding the expulsion of asylum-seekers. The Court declared in case Cruz Varas that an expulsion of an asylum seeker could put at issue Article 3 and engage the responsibility of the expelling State:

> "where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he is to be returned."[62]

The reasoning underlying the judgment of the Court in cases Soering and Cruz Varas to forbid the extradition or expulsion of a foreign person is very interesting. Arguably it is theoretically far-reaching. The Court (and the Commission) have held that the government of a Contracting State may be responsible for a violation of the Convention not only when it occurs in its own jurisdiction, but also when it takes place in the jurisdiction of another State, provided the Contracting State is in a position of preventing such violation to happen. This clearly departs from a literal interpretation of the Convention. On the other hand, this principle has been stated only as far as Article 3 is concerned. However, it could be argued that the same reasoning should also be applied when the rights at stake (i.e. in danger of being violated in another country) are rights protected under other Articles of the E.C.H.R.[63]

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[59] Idem, p.36.

[60] A report of a forensic psychiatrist considered that Mr. Soering was immature and inexperienced and had lost his personality in a symbiotic relation with his girlfriend - a powerful, persuasive and disturbed young woman. See paragraph 21 of the judgment.

[61] Idem, paragraph 111. Finally, the Court also considered relevant that Mr. Soering could be extradited or deported to face trial in Germany, his native country. His crime would not go unpunished.

[62] Cruz Varas v. Sweden, judgment of 20/3/1991, Series A, No. 201, p.28, paragraphs 69 and 70. This ruling was repeated in Vilvarajah and others v. the United Kingdom, judgment of 30/10/1991, series A, No.215, p.34, paragraph 103.

[63] In favour of this application see van Dijk, P. & van Hoof, G.J.H. in *Theory and Practice of the European Convention of Human Rights*, Deventer, Kluwer, 1990, p.236; and Ergec, Rusen & Velu, Jacques *La Convention Europeènne des Droits de L'Homme*, Brussels, Bruylant, 1990, at p.214. See also Vogler, Theo, "The Scope of Extradition", in *Protecting Human Rights: the European Dimension - Studies in Honour of Gerard J. Wiarda*, Matscher, F. & Petzold, H. (eds.), Cologne, Heymanns, 1988, pp.663-671, at 669. Vogler believes that an extradition agreement whose object is a transfer leading to inhuman treatment would be void, "every effect of actions performed on the basis of such an agreement is to be removed, and an extradition already executed has to be reversed." However, for him, this comes as "a legal consequence of a violation of *ius cogens*", because in that respect such extradition agreement

Nevertheless, the theoretically far-reaching reasoning that protected Mr.Soering is limited in practice by the case-law of the Commission and Court of Human Rights. The broad statements of the Commission and the Court, mentioned above, should not mislead on the actual results of their decisions and judgments. It has been particularly hard to make a case on this basis. The applicant has to present strong arguments to convince the Commission and the Court that there is a serious and real risk of him being subjected to the treatment described in Article 3.[64] After Soering, for example, the Commission considered inadmissible an application against an extradition order to the U.S.A., where the applicant would face criminal proceedings for a crime that could entail the death penalty.[65] The Commission held the petition manifestly ill-founded simply because the American prosecutor officer, then charged of the case, made a solemn promise that he would not ask for the death penalty. In the meantime, asylum-seekers have also had considerable difficulties in having their situations protected under the Convention. They are required to present very strong evidence of risk of being submitted to treatment such as that defined in Article 3 of the Convention.[66]

"violates peremptory norms of international law and is therefore void according to the law of international agreements", see idem, p.670. According to Vogler, this is justified by the fact that elementary rights of the person are included in the general principles of international law recognised by all civilised nations. Whenever they are at stake "they constitute a bar to extradition". He states that protection from torture and inhuman or degrading punishment or treatment, as well as the principle of "*nullum crimen, nulla poena sine lege praevia*" would be among such principles of international law. On the contrary, in his opinion, the guarantees of legality of procedure protected by Article 6 of the Convention "only in their intrinsic components" are among these principles of public international law. Note, in the meantime, that in assessing the admissibility of Application No.10308/83, Altun v. Federal Republic of Germany, the Commission considered that an eventual trial (in the State requiring extradition) without the guarantees laid down in Article 6 of the Convention "would not in itself make extradition appear as an inhuman treatment". This constituted one of the reasons to declare the application inadmissible as manifestly ill-founded - D&R, No.36, 1984, p.209, at pp.231-232. However, the Commission and the Court of Human Rights have already declared that it is not excluded that a decision to extradite may exceptionally raise a problem within the scope of Article 6, when the person to be extradited "had suffered or risked suffering a flagrant denial of a fair trial". See case Soering, quoted supra, p.45, paragraph 113 and Application No.22742/93, D&R, No.76-A, 1994, p.164, at p. 172.

[64] See Ergec & Velu, op. cit., pp.214-5. See also, e.g., the decision of the Commission on 20/5/1994, in Application No.24015/94, D&R, No.77-A, 1994, p.144.

[65] See again Application No.22742/93, quoted supra, which the Commission declared inadmissible on 20/1/1994, at p.172.

[66] See cases Cruz Varas v. Sweden, quoted supra; Vilvarajah and others v. the United Kingdom, quoted supra; and Vijayanathan and Pusparajah v. France, judgment of 27/8/1992, series A, Vol.241-B. The first case, the Cruz Varas case, concerned a Chilean asylum-seeker deported to Chile, where he claimed to run the risk of persecution and treatment as defined by Article 3. The Court held that there was no proof of such danger, no substantial basis had been shown to prove his fears, and thus there was no violation of Article 3 of the E.C.H.R., op.cit. paragraphs 77-82. The second case, the Vilvarajah and others case, concerned Tamil asylum seekers in the United Kingdom. In this case, the Court repeated its ruling in the previous case, on the need of proof of risk of treatment as defined by Article 3, op.cit., p.34, paragraph 103. After explaining its "general approach to assessing the risk of ill-treatment" (op.cit., p.36, paragraph 107-108), the Court made its concrete assessment on the existence of such risk in the case. The Court considered that: "substantial grounds [had] not been established for believing that the applicants would not be exposed to a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 3 on their return to Sri Lanka", idem, paragraphs 109-116 and particularly paragraph 111. The Commission had also find no breach of Article 3, by seven votes against seven, with the casting vote of its

As long as the Commission and Court of Human Rights do not adopt a more protective behaviour when the risk of torture and inhuman treatment (or death) is at stake, there seems to be little hope of avoiding expulsions to other countries, in which there is the risk of violation of other rights protected by the Convention.

(ii) Article 8

This is the rule of the Convention most often used in the context of migration cases, notably as far as the respect for family life is concerned. It states that :

> "1. Everyone has the right to respect for his private and family life, his home and correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well being

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President. As far as Article 13 was concerned, the Commission considered that it had been violated, by thirteen votes to one. However, the Court held that Article 13 had not been violated, by seven votes to two. See the dissenting opinion of Judge Russo, who recalls that, while the procedures developed in Strasbourg, the British judicial authorities had meanwhile allowed for the possibility of entry to the applicant's and decided that they had the right to obtain asylum in the UK. See Judge Russo's opinion, op.cit., at p.44 and paragraphs 71-72 of the judgment of the Court for an account of the facts. The third case, the Vijayanathan and Pusparajah case, related to two asylum-seekers, who were Sri Lanka citizens of Tamil origin. They claimed to be in danger of suffering treatment as defined by Article 3 if deported to that country. They claimed that they have been active militants of Tamil organisations and had been arrested and persecuted for such reason in Sri Lanka. They sustained that their deportation would breach Article 3 of the E.C.H.R. With the dissenting opinion of H. G. Schermers, the Commission decided against finding such violation. The Court considered that they had not exhausted domestic remedies, as they had been given a direction to leave French territory, but were not yet subject to an expulsion order enforceable in itself. See also Application No.22414/93, the Chahal Family v. United Kingdom, Press Release of the Secretary of the European Commission of Human Rights, No. 362(94), of 2/9/1994. It concerns a Sikh religious leader, living in the United Kingdom since 1971, with his wife, who settled there in 1975, and their two children - who, having been born there are British nationals. Since 1984, Mr.Chahal has been a prominent religious figure in the affairs of British Sikhs. He has supported the independence of the Sikh homeland in India. In India, in 1984, Mr.Chahal was detained and tortured. In Britain he had been unsuccessfully prosecuted for his involvement in disturbances at Sikh temples. In 1980, the Home Secretary decided to deport him to India, because his continuous presence in the UK was deemed not conducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism. He was arrested and has been detained since then in the UK. He claimed that if he would be deported to India he would run a risk of real torture and persecution, contrary to Article 3 of the E.C.H.R.. Amnesty International backed this claim. He applied for asylum in the UK, but the British authorities refused to grant it to him. Mr.Chahal claimed also that his prolonged detention was not justified under Article 5 of the Convention. His family complained of violation of the right of respect of family life protected by Article 8. The violation of Article 13, on the right to effective remedy against a violation of a right protected by the Convention, was also invoked. The Commission of Human Rights considered the case admissible. See Council of Europe *Information Sheet-human rights*, No.36, January-June 1995, Strasbourg, 1995, at p.52. For cases with positive outcomes, although not decided in last resort by the Commission and Court of Human Rights, see infra the last footnote of the text on the E.C.H.R. On the E.C.H.R. and asylum-seekers, see, generally, Einarsen, Terje, "The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum", International Journal of Refugee Law, Vol. 2, No.3, pp.362-389.

of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[67]

Until the end of the eighties the Commission declared admissible only a few applications of aliens complaining that an expulsion or refusal of entry violated Article 8.[68] The Commission was quite demanding in formulating the conditions required to find a violation of that provision. As far as family life is concerned, the substantial analysis of a case was usually divided into three phases. First, there was an assessment of the existence of an effective family life. Secondly, the Commission would verify that the relevant migration measure did actually interfere with the family life of the applicants. Finally, if the answer was positive with respect to these two issues, the Commission would examine whether there was a justification for such a measure under Article 8(2). In this respect, the Commission considers often that States have a margin of appreciation in determining whether an interference is "necessary in a democratic society".[69]

As far as the first point is concerned, i.e. the determination of the existence of family life, recourse is made to several criteria, like the existence of biological, sentimental and financial ties, which are close and effective. The existence of family life is normally regarded as being a matter of fact. Thus, for spouses it is demanded that their marriage is a real marriage and not a marriage of convenience. Likewise, Article 8 seems to protect more easily family reunification than family formation. It has been held that Article 8 protects **existing** family life, but does not oblige a Party to grant entry to its territory to a foreigner citizen for the purposes of establishing a **new** family relationship there.[70] However, the separation of fiancés may raise the issue of the respect for the right of family life, in combination with the principle of equality in the enjoyment of the rights protected

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[67] On Article 8 of the E.C.H.R. see, inter alia, Cohen-Jonathan, G. "Respect for Private and Family Life", in *The European System for the Protection of Human Rights*, Macdonald, R. , Matscher, F. & Petzold, H. (eds.), Dordrecht, Martinus Nijhoff, 1993, pp.405-444; Drzemczewski, A. *The right to respect for private and family life, home and correspondence, as guaranteed by Article 8 of the European Convention of Human Rights*, Strasbourg, Council of Europe Directorate of Human Rights, 1984; Duffy, P.J. "The Protection of Privacy, Family Life and Other Rights under Article 8 of the European Convention on Human Rights", *YEL*, Vol.2, 1982, pp.191-238; Robertson, A.H. & Merrils, J.G. *Human Rights in Europe - A Study of the European Convention of Human Rights*, 3rd.ed., Manchester, Manchester University Press, 1993, p.127; and Villiger, M.E. "Expulsion and the right to respect for private and family life (Article 8 of the Convention) - an introduction to the Commission's case-law", in *Protecting Human Rights: the European Dimension* ..., op. cit., pp.657-662.

[68] On the admissibility of applications to the Commission of Human Rights (and the UN Human Rights Committee), in general terms, see Zwart, Tom, *The Admissibility of Human Rights Petitions - the Case Law of the European Commission of Human Rights and the Human Rights Committee*, Dordrecht, Martinus Nijhoff, 1994, and particularly chapter 5, at pp.139-154, on admissibility related to the merits.

[69] For an analysis of the margin of appreciation doctrine, for the E.C.H.R. in general, see Jones, T.H., "The Devaluation of Human Rights Under the European Convention", *Public Law*, Autumn 1995, pp.430-449 (who sustains that "The margin of appreciation is an imprecise legal doctrine, although hardly unique in that.", idem, p.448); and Yourow, H. C., *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Dordrecht, Martinus Nijhoff, 1995.

[70] Commission's decision in Application 7229/75 X and Y v. Germany, D&R, No.9, 1977, p. 219.

by the Convention.[71] Nonetheless, marriage is not indispensable for recognition of the existence of family life for the purposes of Article 8. Extra-marital relationships of a couple may also constitute family life,[72] as well as relationships outside marriage between parents and their children.[73] Cohabitation is in principle required, but in particular cases the existence of regular contacts may be sufficient.[74] Finally, homosexuals couples are considered not to have family relations.[75] In any case, this relatively broad formulation of the concept of family life does not mean that in migration cases it was (or is) easy to sustain the existence of family life for the purposes of Article 8.

Moreover, the Commission was particularly demanding as far as the second point is concerned, i.e. in assessing whether the migration measure imposed interfered with the family life of the applicants. Usually, to accept the existence of such interference, the Commission demanded a proof that the applicants would not be able to move and live together somewhere else, outside the territory of the Contracting State concerned.[76] That is what Storey calls the "elsewhere test".[77] This requirement would only be put aside if the applicants demonstrated the existence of serious and practical, or insurmountable obstacles to change country of residence, as well as if special reasons existed for not demanding that prerequisite. Such special reasons include the existence of strong links with the Contracting State of residence, the absence of such links with another country and the impossibility for the applicants to know in advance whether a similar immigration measure could threaten their family life.

The "elsewhere test" seems particularly open to criticism. Clearly, the Commission preferred to be particularly demanding in accepting the existence of interference with family life, instead of admitting such interference and then develop legal criteria to determine whether it was justified under the restriction clause of Article 8(2). This strict avoidance of scrutiny of migration measures is not satisfactory. Furthermore, in the use of

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[71] See case Abdulaziz et al., judgment of 28/5/1985, Series A, No. 94, and *European Human Rights Report*, Vol.7, 1985, No.28, pp.471-511. This case is also referred infra, in the main text, on Article 14 of the E.C.H.R.

[72] Applications No.7289/75 and No.7349/76, X and Y v. Switzerland, Yearbook E.C.H.R., Vol.20, 1977, p.372, at 408.

[73] See cases Berrehab v. Netherlands, judgment of 21/6/1988, Series A, No. 138. See also the judgments of the Court in cases Marckx v. Belgium, Series A, No.31, 1979, paragraph 31 (on the rights of the mother); Rasmussen v. Denmark, judgment of 28/11/1984, Series A, No.87, 1985 (on the father); Johnston v. Ireland, Series A, No.112, 1987 (as far as both parents are concerned, but particularly on the position of the father); and Keegan v. Ireland, judgment of 26/5/1994, series A, Vol.290 (on the rights of the biological father not living with the mother). Likewise, see the Commission's decision on the admissibility of Application No.20769/92, G.F. v. Germany, D&R, No.78-A, 1994, p.111, in which is declared that Article 8 makes no distinction between "legitimate" and "illegitimate" family. See also case Kroon v. the Netherlands, judgment of 27 October 1994, series A, No.297-C.

[74] See, again case Berrehab. Note also that in case Kroon, quoted in the preceding note, the European Court of Human Rights declared that "as a rule, living together may be a requirement for 'family life', but exceptionally other factors may also serve to demonstrate that a relationship had sufficient constancy to create de facto 'family ties' - such is the case here, as four children have been born to Mrs.Kroon and Zerrock". The latter were not married, nor cohabited.

[75] Commission decision in Application No.9369/81, D&R, No.32, 1983, p.220.

[76] See Abdulaziz et al., case quoted supra, at p.34, paragraph 68.

[77] See Storey, H., "The Right to Family Life and Immigration Case-Law at Strasbourg", *ICLQ*, Vol.39, 1990, No.2, pp.328-344.

the "elsewhere test" there seems to be a confusion between general interference with a relationship and interference capable of terminating it, or seriously threatening its existence. It may be that in a certain case the expulsion of one member of a family will not terminate completely the relation between him and the rest of the family. Because, for instance, the whole family has the possibility of moving to another country. However, it seems hard to sustain that to oblige a family to change the country of residence is not an interference with their family life.[78] It does certainly affect the life of the family as such.[79] In this respect, as far as the respect for family life is concerned, one may note some Commission decisions in cases not involving migration matters. The Commission has dealt, for instance, with cases concerning persons being imprisoned in a jail that was so distant from the residence of their family that all visits by the latter family were practically impossible.[80] In these cases the Commission considered that here was an indirect restriction on the right of family life, although justified on grounds of public safety. Another comparison could perhaps also be made with other rights protected by the Convention, for instance with the right to liberty, protected by Article 6 of the Convention. If such right was restricted for persons living in a certain part of a country, could it be said that there was no interference at all with such right, provided such persons could move to another part of the country where such a right was fully respected?

In any case, from the end of the eighties onwards, the case-law of the Commission and Court of Human Rights became more liberal. In more cases it was found that expulsion of foreigners violated Article 8 of the Convention, as far as their right to respect of family life was concerned.[81] Invariably, in these cases the persons concerned were not

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[78] A similar remark can be made regarding the denial to nationals of a Contracting Party to exercise, in the territory of that Party, their right to family life with an alien spouse. It can be argued that such denial, including the denial of permission to the spouse to enter and reside for that purpose, is an interference with the respect of family life. For a good analysis of this issue see Cvetic, G., "Immigration Cases in Strasbourg: The Right to Family Life Under Article 8 of the European Convention", in *ICLQ*, Vol. 36, July 1987, No.3, pp. 647-655.

[79] In alternative, it could be said that such change of the country of residence would affect the private life of each and all members of the family, individually and collectively. In any case, Article 8 of the Convention protects private life as well. See infra, in the main text, my remarks on the relevance of this point in the context of migration cases .

[80] See Application No.5712/72, decision of 18/7/1974, in Collection of decisions of the European Commission of Human Rights, No.46, p.112; and Application No.8586/79, decision of 10/10/1980, unpublished, abstract in *Digest of Strasbourg Case-Law relating to the European Convention of Human Rights*, Vol.3 (Articles 7-12), Council of Europe / Heymanns, Cologne, 1984, p.126.

in *Digest of Strasbourg Case-Law relating to the European Convention of Human Rights*, Vol.3, p.126.

[81] See cases Berrehab v. Netherlands, judgment of 21/6/1988, Series A, No. 138; Moustaquim v. Belgium, judgment of 18/2/1991, Series A, No. 193; Beldjoudi v. France, judgment of 26/3/1992, Series A, No. 234-A; and Nasri v. France, judgment of the Court of 13/7/1995, Series A, Vol.322-B. Note also the friendly settlements achieved in cases Djeroud v. France, judgment of 23/1/1991, Series A, No. 191-B, and Lamguindaz v. United Kingdom, judgment of 28/6/1993, Series A. No. 258-C. The latter case concerned the deportation of Moroccan national who was 7 years old when he come to the United Kingdom and had lived since with his family. He spoke no Arabic and had no family or friends in Morocco. Although he had committed several criminal offences, the Commission decided that his deportation did violate Article 8.

nationals of a Member State, nor of any other State of the Council of Europe. A considerable part of these new cases concerned the expulsion of foreigners convicted for multiple crimes who had a very close connection with the State of residence.[82] Frequently, they had been living with their family for a long period of time in the territory of a Contracting Party.[83]

It was held by the Commission and the Court that their expulsion was an interference with their right to respect for family life, because they had a continued relationship with their families residing in the expelling countries. The authorities of the latter claimed that their expulsion had the aim of preventing disorder and crime, which was accepted by the Commission and Court of Human Rights as being a legitimate aim. Nevertheless, the interference with their family lives caused by their expulsion, was held not to be "necessary in a democratic society", since not proportionate to the aim pursued. To determine whether or not the expulsions were proportionate to the legitimate aim pursued, consideration was given to the circumstances and the background of the applicant. It was considered important that the persons subject to expulsion had long lasting ties with the expelling country and with their families living there. It was also seen as important that it would be difficult for them to live in the country to which they were going to be expelled - an application of the "elsewhere test". This difficulty was explained by their ignorance of the language of that country and by the absence of family or friends there. In this type of situation it was considered that the expulsion would constitute such an hardship as not to be proportionate to the legitimate aim pursued.[84] Thus, the expulsions were held to infringe Article 8, as far as the right to respect of family life was concerned.

However, it may also be argued that the expulsion of long resident foreigners may raise the issue of the respect of their right to private life. This right may be violated

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[82] That was not the situation at stake in case Berrehab, to be analysed in chapter 4, section B. This case concerned a Moroccan citizen who was given a residence permit to live with his Dutch wife, from whom he had a child. When the couple divorced he was expelled. The Court considered that his expulsion violated his right to have respected his family life with his daughter, with whom he had regular and close contacts, when he was in Netherlands.

[83] In the Beldjoudi case, the applicant was even born there.

[84] Such an hardship was particularly serious in the Nasri case. This concerned the expulsion of an Algerian national born in 1960, who come to live with his parents in France in 1965. He had been born deaf and dumb, he was illiterate and had little knowledge of sign language. He had been convicted five times for various crimes, including one of gang rape. The Court held his deportation to Algeria not to be proportionate to the legitimate aim of protection of disorder and prevention of crime and would infringe his right to respect for family life. The Court recalled that he had not been the instigator of the rape for which he was convicted, and since then had not re-offended. Moreover, with such an handicap his family was very important for him, even for preventing him to elapse into a life of crime. Besides, he did not understand Arabic (he was deaf and dumb) and the majority of members of his family were French nationals with no close ties to Algeria. An eventual violation of Article 3 of the Convention was declared by the Court not necessary to be examined, in the view of the finding of a violation of Article 8. In its report on the case the Commission had considered that both Article 3 and 8 of the E.C.H.R. would be violated if the expulsion was performed. See the report of the Commission of 10/3/1994, and the judgment of the Court of 13/7/1995, Series A, Vol.322-B.

independently of a violation of the right of respect for their family life.[85] It seems a reasonable interpretation of the concept of "private life", protected by Article 8, to sustain that it includes the human relations that an individual develops with others while living in a country. This could, for instance protect the rights of homosexuals couples, who are regarded by the Commission not to have family relations.[86] Furthermore, it could also protect the situation of (other) persons who have been living for a considerable time in a Contracting Party, but who do not happen to have family members there - for example, because they died.

Persons without family ties in the country of residence may also have been settled there for a considerable time, may have all their life connected with that country, and may have no ties with the country of their nationality, or with any other country, apart from that of residence. The personal consequences of their expulsion may be as serious as if they had family relations in the country of residence. Such persons would usually have to learn a new language and break all ties with friends, as well as their labour and social relations in the country of residence. An eventual expulsion of a person in such situation should be scrutinised under Article 8(2). There could be a presumption of absence of a need in a democratic society to expel such a person. A presumption that would admit derogation under stringent circumstances only.[87]

The relevance for their right to respect of private life of the expulsion of foreigners is endorsed even by some judges of the Court of Human Rights and by members of the Commission.[88] Moreover, to a certain extent, it seems to find some support in the

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[85] It must be recalled that, when a breach of the Convention is found on one ground, the Commission and Court of Human Rights usually do not examine whether such a breach may exist as far as another ground is considered. Thus, the fact that a violation of the right to respect of family life is found in a case, does not necessarily mean that the Court or the Commission consider that such violation does not exist as far as respect for private life is concerned.

[86] See the Commission decision in Application No.9369/81, quoted supra. There, the Commission held that relations between an homosexual couple do not arise the issue of family life, but of private life. Thus, the expulsion of an homosexual couple may constitute an interference to the exercise of the right of respect of private life, provided it is established that the couple cannot live elsewhere and that the connection with the expelling State is a fundamental element of their relation. However, neither in this, nor in any other case, was a homosexual couple protected under the Convention, in the context of a migration case.

[87] Note that, according to the Court of Human Rights, respect for family life "implies an obligation for the State to act in manner calculated to allow [family] ties to develop normally", Marckx v. Belgium, judgment of 13/6/1979, Series A, No. 31, paragraph 45. This is what is called the positive obligation of a State. It is submitted that, for example in case of persons in the circumstances described in the main text, there is also a positive obligation of the State to allow that their private lives "develop normally", namely by not expelling them from their country of long residence.

[88] For a member of the Commission, see Schermers, in his partly concurring, partly dissenting opinion in case Lamguindaz, quoted supra, at pg. 104. In favour see also judge Martens, in his concurring opinion in the Beldjoudi case. He recalls Article 12(4) of the International Covenant of Civil and Political Rights, according to which "No one may be arbitrarily deprived of the right of entry to his own country". He believes that this rule includes a prohibition of expulsion from one country of all foreigners integrated in it. See judgment of the Court in case Beldjoudi, Series A, No. 234-A, at pp. 37-8. In the same case, judge De Meyer considered that the expulsion would constitute "an unacceptable interference" with the private and family life of the applicants. In pointed out that Mr.Beldjoudi had resided in France for over forty years, and that country "has always in fact been 'his' since his birth, even though he [did] not possess his nationality". Thus, he sustained that such expulsion would be even an inhuman treatment. He hold the

Commission itself, in its decision in the Lamguindaz case. This case concerned a Moroccan national expelled from the United Kingdom after having committed several criminal offences. The Commission decided that his deportation would violate Article 8, recalling that

> "(...) the applicant had lived in the United Kingdom from an early age, that his close relatives all live in the United Kingdom and that he had received his education there. Until he was abandoned there in 1988 [for 19 months] he had no real links with Morocco or acquaintance with its culture or language. Although he is legally an alien, his family and social ties are therefore in the United Kingdom and his nationality status does not reflect his actual position in human terms"[89]

The previous remarks dealt with expulsion of foreigners who had been living for a long time with their family in a Contracting Party. However, a recent case may raise hopes that Article 8 may also be used to ask for the right of entry for persons residing in another country. In its report on the Gül case,[90] the Commission decided by 14 votes to 10 that Switzerland had violated Article 8 by not granting a residence permit to a minor son of a Turkish national resident in the country, on the grounds that his father had insufficient means to support him and his wife could not look after him because she was epileptic.[91] Mr Gül, his wife and their baby daughter had been granted a residence permit in Switzerland on humanitarian grounds. This case is now before the Court.

Another possibility of raising the compatibility of migration measures with the E.C.H.R. is through the combined consideration of its Article 8 and Article 14. The latter provides that:

> "The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

In Abdulaziz,[92] the Court of Human Rights considered that the United Kingdom had violated Articles 8 and 14 of the Convention for requiring more restrictive conditions for the admission of husbands to join wives living in that country, than for the admission of wives to join husbands.

It can also be argued that Articles 8 and 14 are violated when an expulsion order is attached to a criminal sentence given to a foreigner, while such expulsion would not be imposed on a national. Those provisions would be violated particularly when, having regard to the foreigner's situation, namely a long residence and family ties in the country,

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view that, as far as his offences were concerned, Mr.Beldjoudi could be sufficiently punished by criminal law. Idem, at p.35. On the respect of private life as far as an expulsion order is concerned, see also the Commission decision of 19/5/1994 in Application No.23634/94, D&R, No.77-A, 1994, p.133.

89 Lamguindaz, case quoted supra, op. cit., at p.102. Emphasis added.

90 Gül v. Switzerland, Application No.23218/94.

91 See the report of the Commission on the case, adopted on 4 April 1995. See also the Press Release No.290 of the Registrar of the European Court of Human Rights, of 6/6/1995, and the Press Release No. 525 of the Registrar of the Court, of 25/10/1995, the latter on the hearing of the case by the Court on the same date.

92 Abdulaziz et al., judgment of 28/5/1985, Series A, No. 94.

he or she can be compared to nationals of that country "in the context of punishment for a specific crime".[93]

(iii) Other relevant provisions

Other provisions of the E.C.H.R. and of the Protocols to it have been used in the context of migration cases.

Article 5, for example, guarantees the liberty and security of a person. However, its paragraph (1) (f) provides that one of the exceptions to this general rule is the case of deprivation of liberty, in accordance with a procedure prescribed by law, when there is a

> "lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."[94]

Although the arrest or detention of such a person is cleared under this provision, it is stated twice that the arrest or detention must be legal.

Article 6 provides for a fair hearing in the determination of "civil rights and obligations" and of a "criminal charge".[95] The Commission of Human Rights has held that proceedings on the prohibition of entry, residence permit, and deportation of an alien are not related to the determination of civil rights and obligations, and thus, are not covered by the E.C.H.R.[96] However, such assessment seems more difficult to apply when the right to family life is at stake in migration proceedings. Moreover, the protection of Article 6 applies to proceedings in which the violation of migration legislation is qualified as a criminal action.[97] Finally, this Article can be of indirect, but also concrete interest for third

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[93] Schermers opinion in the Commission's report in case Lamguindaz, quoted infra. Schermers criticises the Commission for usually considering that there is no violation of the principle of equality of treatment when expulsion orders are imposed as an addition to criminal sanctions, but only to foreigners and not to nationals. He takes the view that the Commission's argument that the expulsion is an administrative act and not an additional punishment is "too formalistic". He adds that "[i]n reality expulsion is often a more heavy punishment than a prison sentence. In many cases it totally upsets the life of the person concerned." Idem, p. 105. These measures could be also be assessed by comparison with the measures imposed on nationals. If the latter are considered satisfactory to prevent crime by nationals, why should additional measures be necessary in relation to foreign nationals? Should expulsion measures be a proper alternative to a reform of criminal policy? In any case, the eventual relevance of this observation in the light of the E.C.H.R. can only be sustained through the relation of discriminatory treatment with another provision of the Convention, besides Article 14. That is precisely what Schermers did.

[94] Article 5 (1) (f).

[95] On the rights of accused persons under Article 6 of the E.C.H.R., see Stavros, S., *The Guarantees for Accused Persons under Article 6 of the European Convention of Human Rights*, Dordrecht, Martinus Nijhoff, 1993.

[96] Applications No.7289/75 and 7349/75, X and Y v. Switzerland, D&R, No.9, 1978, p.57; No.8244/79, Uppal v. United Kingdom, D&R, No.17, 1980, p.149; and 7729/76, Agee v. United Kingdom, D&R, No.7, 1977, p.164, respectively. See also, for a similar decision in a case of extradition, Application No.13930/88, Commission decision of 11/3/1989, D&R, No.60, 1989, p.272.

[97] As far as criminal actions are concerned, see also Article 2 of Protocol No. 7 to the E.C.H.R (of 1984, ETS, No.117); as well as Article 7 of the E.C.H.R. itself. On the latter see, e.g., Jamil v. France, Application No.15917/89, judgment of the Court of 8/6/1995, Series A, Vol.320. It concerns a Brazilian national who was condemned in France under a criminal law applied retrospectively. Such application was found in breach of Article 7(1) of the E.C.H.R.

country nationals, when they are subject to a deportation order, taken as a consequence of criminal proceedings. These proceedings have to conform to Article 6.[98]

Article 12 provides that:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

This Article has been invoked against deportation orders, but, according to the Commission of Human Rights, this right has to be read subject to Article 5 (1)(f), above quoted, which provides for the arrest or detention of a person "against whom action is being taken with a view to deportation or extradition."[99]

In the Fourth Protocol to the E.C.H.R., Article 2 guarantees the free movement and residence within the territory of a State of everyone lawfully present there. This right, however, can be subject to restrictions, if these are made,

> "in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of rights and freedoms of others."

Article 4 of the same Protocol prohibits the "collective expulsion of aliens". No reservation or qualification is made to this rule. Yet, it has been held not applicable to cases of expulsion of groups of aliens, when such expulsion is based on a reasonable and objective examination of the particular cases of each individual aliens.[100]

Finally, Article 1 of the Seventh Protocol to the E.C.H.R. gives minimum procedural guarantees to aliens in relation to their expulsion, provided they are lawfully resident in the State.[101] Their expulsion shall be made only "in pursuance of a decision reached in accordance with the law", and after they have been allowed to submit reasons against the expulsion, have their case reviewed, and be represented for these purposes before the competent authority or persons designated by the latter. The person may be expelled before the exercise of these rights, "when such expulsion is necessary in the interests of public order or is grounded on reasons of national security".

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[98] This was confirmed in case Saïdi, a Tunisian national who had been sentenced to 8 years of imprisonment and permanent exclusion from French territory. The Court of Human Rights considered that France had violated Article 6(1) and (3)(f) of the E.C.H.R. because it had failed to organise a confrontation with the prosecutor witness, whose statements constituted the sole basis for the applicant's conviction for drug trafficking, therefore depriving him in certain respects of a fair trial. See case Saïdi, Application No.14647/89, judgment of the Court of 20/9/1993, Series A, Vol.261-C.

[99] See Applications No.7175/75, X v. Germany, D&R, No.6, 1977, p.138, No. 7031/75, X v. Switzerland, idem, p.124, and No.5269/71, X & Y v. United Kingdom, Yearbook E.C.H.R., Vol.15, 1972, p.564.

[100] Application No.7011/75, Becker V. Denmark, XIX Yearbook E.C.H.R., Vol.19, 1976, p.416, at 454; and D&R, No.4, 1976, p.215 at 235. This case dealt with the expulsion of 199 Vietnamese children who had been temporarily placed in an hostel in Denmark. On mass expulsion of aliens, see generally Henckaerts, Jean-Marie "The Current Status and Content of the Prohibition of Mass Expulsion of Aliens", *HRLJ*, Vol.15, 30/11/1994, No.8-10, pp.301-317. For a more detailed analysis of the topic see his "Mass Expulsion in Modern International Law and Practice", Dordrecht, Martinus Nijhoff, 1995.

[101] It may be argue that the legality of their residence includes not only the respect by the individual of the relevant national legislation, but also the respect by the State of residence of the rules of the E.C.H.R. and its Protocols, which bind that State. See Plender, op.cit., p.236.

As we have seen, the E.C.H.R. was not drafted specifically to provide protection to migrants, nor, in general terms, to third country nationals living in the Contracting Parties. Nevertheless, the Convention has a considerable importance for the protection of the rights of such persons. Such importance derives not only from the mere content of its rules. It derives also from the interpretation given to them by the Commission and Court of Human Rights, as well as from its binding system of enforcement. It is certainly true that, in some cases, the Commission and the Court could have done more to protect the rights of third country nationals. However, on several occasions they have also granted considerable protection to them. Furthermore, it cannot be forgotten that, as in relation to any other rule of Law, the real effect of the case-law of the E.C.H.R. transcends the cases that are actually decided by the judicial authorities. It is clear that, in spite of its limitations, the E.C.H.R. has had a practical influence on respect of the rights of third country nationals in the European Union.[102]

b) Other Conventions of the Council of Europe

Besides the E.C.H.R., there are other Conventions adopted within the framework of the Council of Europe that are of relevance to the legal status of third country nationals in Member States of the European Union. However, while the E.C.H.R. applies to everyone "within the jurisdiction" of the Contracting Parties, the following Conventions usually apply only to nationals of the Contracting Parties. In almost all cases this means that these Conventions apply only to States members of the Council of Europe that have ratified the Conventions.[103] Their relevance, for the purposes of this thesis lies in the fact that some members of the Council of Europe are not Member States of the European Union. The Conventions are particularly important when they cover not only nationals of EEA countries (which, when their countries are not Member States of the European Union, benefit basically from the same rights as the nationals of those member States), but also nationals of Turkey. Furthermore, with the recent entry in the Council of Europe of States of Central and Eastern Europe, the Conventions to be examined below may also apply to these States, to the extent that they have ratified or will ratify them.

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[102] See, for example, the friendly settlement reached in application 15671/89, Abbas v. France, on the expulsion of an Algerian national who had lived in France from the age of three. His expulsion order was annulled and he was grant a residence permit - see Council of Europe *Information Sheet-human rights*, No.31, June-December 1992, Strasbourg 1994, at p.48. See also the 10 migration cases, "struck off the list" due to attainment of a satisfying solution to the applicants. These cases concerned (namely) the expulsion of integrated aliens and asylum-seekers - see *Council of Europe Information Sheet-human rights*, No.33, July-December 1993, Strasbourg 1994, at p.47(point D.1), and *Council of Europe Information Sheet-human rights*, No.34, January-June 1994, Strasbourg 1994, at p.69. See, finally, the case of Application No. 22903/93, D.R. v. France, D&R, No.76-A, 1994, p.174. It concerned an instruction to leave the country issued to an Algerian, member of the "F.I.S." and condemned to death in his country. The case was struck off the list, due the achievement of a solution satisfactory to the applicant. As far as decisions of national court are concerned, see, e.g., the judgment of 26/11/1993, of the French administrative court of Versailles, in case Teguig v. Préfet de Versailles, which annulled an expulsion order of an Algerian woman who cohabited with a French citizen, from whom she was pregnant, and with whom she wanted to marry. See *Plein Droit*, No.24, 1994, p. 37.

[103] In some cases, the Conventions are open to accession by States that are not members of the Council of Europe.

(i) European Convention on Establishment [104]

This Convention was concluded in 1955 and its interest goes beyond its immediate practical effect. Its interest lies in the fact that it is a Convention of wide scope, and that it has influenced some other instruments on similar matters, notably later EEC rules on free movement of persons. The Convention deals with the admission, expulsion, and legal status of physical persons who are nationals of one Party in the territory of another Party. The rules on their legal status cover a broad range of domains, including their conditions of access to a gainful activity. However, the Convention has significant limits. First, most of its provisions granting rights to foreigners are qualified or subject to reserve clauses that diminish their practical effect. According to Section I of the Protocol to the Convention,[105] each Party has the right to judge by national criteria the meaning of most of such qualifications and reservations. Furthermore, the Convention applies only to nationals of the Contracting Parties - which are at present Turkey, Norway and 10 Member States of the European Union.[106] Finally, its enforcement mechanism is rather weak. There is no possibility to present individual complaints. A Standing Committee composed of representatives of the Parties is charged only with formulating proposals to improve the practical implementation of the Convention and, if necessary, to amend or supplement its provisions. The Committee publishes also a periodical report on laws and regulation related to the matters dealt with by the Convention. In case of disputes between States Parties on the interpretation and application of the Convention, recourse is to be made to the International Court of Justice, or, for the States that ratified it, to the European Convention for the Peaceful Settlement of Disputes, of 1957.[107]

Article 1 of the Convention provides that each Party shall facilitate to nationals of other Parties the entry in its territory for the purposes of temporary visits, and shall permit them to travel freely within such territory, except when that will be contrary to "*ordre public*, national security, public health or morality". This provision was a precedent of the limitation on grounds of public policy, public security and public health to the free

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[104] ETS, No.19; UNTS, Vol.529, p.141.

[105] Which, according to Article 32 of the Convention, "shall form an integral part of it".

[106] All Member States, except Austria, Finland, France, Portugal and Spain. The Convention applies in principle only to metropolitan territories of the Contracting Parties, unless these declare that it applies to non-metropolitan territories. See Articles 29 and 30. Note also that Plender, op.cit., pp.238-9, recalls that there is some support for the view that the rules of the Convention could be extended to nationals of countries not Party to the Convention, through the invocation of "most favoured nation" clauses included in other treaties. Plender, however, seems to take the view that, given the objectives of the Convention (e.g. as declared in its Preamble), such use of the "most favoured nation clause" should be allowed among States members of the Council of Europe. In any case, unlike what happens in trade agreements, "most favoured nation" clauses do not seem to be very common in treaties related to the matters of this Convention.

[107] ETS, No.23, ratified by 13 States, including Malta, Norway, Switzerland and all Member States, except Finland, France, Greece, Ireland, Portugal, and Spain. The States that did ratify both this Convention and the European Convention on Establishment are: Belgium, Denmark, Germany, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. These are the States that are committed to use the provisions of the Convention for the Peaceful Settlement of Disputes, instead of having recourse to the International Court of Justice in order to settle disputes on the Convention on Establishment.

movement of workers within the Community.[108] Article 2 refers that subject to those limitations and to "the extent permitted by its economic and social conditions", each Party shall "facilitate the prolonged or permanent residence in its territory of nationals of other parties". Article 3 establishes several limits to the possibility of expulsion of persons "lawfully resident". Paragraph 1 provides that nationals of any Contracting Party lawfully residing in the territory of another Party can be expelled "only if they endanger national security or offend against *ordre public* or morality". According to paragraph 2, in the case of expulsion of a person lawfully resident for two years, that person has the right to submit reasons against such expulsion, to appeal to, and to be represented before a competent authority, or persons designated by the latter. Finally, paragraph 3 establishes that "nationals of any Contracting Party lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security", or due to reasons related to their offence against *ordre public* or morality, if those reasons "are of a particularly serious nature".

Furthermore, the Convention provides for a principle of equality of treatment in the host country between nationals of the latter and nationals of other Contracting Parties. This principle applies to a wide range of matters, including: the possession and exercise of private rights, including rights related to property (in the latter case safe for reasons of national security or defence); legal and judicial protection of property, persons, rights and interests, including the right of access to the competent judicial and administrative authority, the right to obtain legal assistance and even legal aid; the right to admission to primary and secondary education and technical and vocational training (but not granting of scholarships); taxation; compulsory civil service; and also expropriation and nationalisation of property.

The equality principle applies also to several aspects related to the taking up and exercise of gainful occupations. Save for "cogent economic or social reasons",[109] the equality principle applies to authorisations to engage in gainful occupations, for both self-employed and employed persons, and including, inter alia, "industrial, commercial, financial and agricultural occupations, skilled crafts and the professions."[110] The authorities of the host countries cannot apply the mentioned restrictions on economic and social grounds if the persons were "lawfully engaged in a gainful occupation (...) for an uninterrupted period of five years"; or "have lawfully resided [there] for an uninterrupted period of ten years"; or if "they have been admitted to permanent residence".[111] The effect of this provision can be limited under specified conditions, through a declaration made by the Parties at the signature or deposit of the instrument of ratification of the Convention.[112] Another possible restriction is that of Article 13 of the Convention, which

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[108] Article 48(3) of the EC Treaty. See Plender, op. cit., p.238.

[109] See also Article 14, which regulates the case of past restrictions and establishes a stand-still clause for restrictions on the exercise of gainful occupations, safe for "imperative reasons of an economic and social character."

[110] Article 10. Article 16 of the Convention regulates the case of commercial travellers "employed by an undertaking whose principal place of business is situated in the territory of a Contracting Party". They do not need authorisation to exercise their occupation in the territory of another Party, "provided they do not reside therein for more than two months during any half-year."

[111] Article 12 (1).

[112] See Article 12 (2).

reminds Article 48(4) of the EC Treaty, excluding employment in the public service from the scope of EC rules on free movement of workers. Article 13 of the European Convention on Establishment allows Parties to

> "reserve for its own nationals the exercise of public functions or of occupations connected with national security or defence, or make the exercise of these occupations by aliens subject to special conditions."

This reminds more the EC's Court of Justice interpretation of Article 48(4) of the EC Treaty, according to which free movement of workers is only excluded in relation to

> "posts which involve direct and indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities".[113]

On the other hand, under the European Convention on Establishment, the principle of equality of treatment applies also in the case that the exercise of an occupation is submitted to the production of guarantees and the possession of professional and technical qualifications.[114] However, the Convention contains no rules for the recognition of diplomas or periods of studies.

As far as the exercise of occupations is concerned, an important point is that equality of treatment applies to "statutory regulation by a public authority concerning wages and working conditions in general".[115] Likewise, Parties cannot forbid nationals of another Party to be electors on equal conditions to nationals of the host country, in elections to economic and professional bodies or organisations. However, this is valid only for persons who have been lawfully engaged in an appropriate occupation for at least five years, and subject to decisions that such bodies or organisations take within their limits of competence.[116]

(ii) European Social Charter[117]

The European Social Charter was adopted in 1961 and complements the protection of rights ensured by the E.C.H.R. The Charter is generally regarded as having had an important influence in the harmonisation of social policies in Western Europe. It protects a wide range of social and economic rights, including rights regarding work and workers (including children, young persons and women workers); the right to vocational guidance; to vocational training; to protection of health; to social security; to social and medical assistance; to benefit from social welfare services; rights of physically or mentally disabled persons; to social, legal and economic protection of the family; and to the right of mothers and children to social and economic protection.[118]

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[113] Case 149/79, Commission v. Belgium, [1980] ECR 3881, at 3900.

[114] Article 15.

[115] Article 17

[116] Article 18.

[117] ETS, No.35. Adopted in 1961, it was ratified by 20 States, including Turkey and all Member States. See Niessen, Jan & de Lary de Latour, H. "Equality of treatment: the European Social Charter and the European Convention on the Legal Status of Migrant Workers", in *The use of international conventions...*, op. cit., at pp. 93-101.

[118] The Additional Protocol to the Charter of 1988 (ETS, No.128) protects further rights: the right to equal treatment for both sexes in matters of employment and occupation; the right to information and consultation of workers within the undertakings; the right to take part in the determination and improvement of the working conditions and working environment in the undertaking, and the right of

Each State is obliged to accept only a part of the Charter provisions, comprising at least 5 out of 7 fundamental Articles. Among the latter there is Article 19 of the Charter, on the "right of migrant workers and their families to protection and assistance". This provision is based in large part on the ILO Convention No.97, examined above; but it applies also to self-employed migrants, where appropriate.[119] Article 19 includes general rules obliging Member States to provide adequate and free services to assist migrant workers; to adopt measures to facilitate the departure, journey and reception of such workers and their families; and to promote cooperation "between social services, public and private, in emigration and immigration matters". Governments will also allow, "within legal limits", the transfer of such parts of earnings and savings of migrant workers "as they may desire". Migrant workers who are lawfully residents are not to be expelled "unless they endanger national security or offend against public interest or morality". Article 19(6) provides that the Contracting Parties shall facilitate "as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory". The Annex to the Charter specifies that "family of a foreign worker" is understood to mean at least his wife and dependent children under the age of 21 years.

Moreover, Article 19(4) establishes the principle of equality of treatment between regular migrant workers and nationals of the host country. This principle applies to remuneration and other employment and working conditions (but not access to employment); to membership of trade unions and enjoyment of the benefits of collective bargaining; and to accommodation. However, this equality principle is to be guaranteed only in so far as such matters are regulated by law or regulation, or when they are subject to the control of administrative authorities. The equality principle applies also to "employment taxes, dues or contributions payable in respect of employed persons",[120] and to "legal proceedings referring to matters" dealt with in the very Article 19 of the Charter.[121]

Article 18 of the Charter is also important for migrants. It establishes that the Parties shall apply existing regulations in a spirit of liberality, with a view "to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Contracting Party".

The European Social Charter applies to foreigners but "only in so far as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned", subject to the understanding that "Articles 1 to 17 are to be interpreted in the light of the provisions of Articles 18 and 19",[122] these provisions referring specifically to the rights of migrant workers and their families. The European Social Charter applies to third country nationals residing in the Member States of the European Union, provided they are nationals of States members of the Council of

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elderly persons to social protection. It has the same personal scope of the Charter and a similar system of supervision of enforcement. However, it was ratified by 6 States only: Austria, Finland, Italy, Netherlands, Sweden and Norway.

[119] Contrary to that Convention, see Article 11 of the latter - which excludes workers employed on their own account.

[120] Article 19(5).

[121] Article 19 (7).

[122] Appendix to the Social Charter. Note that the annex to the Additional Protocol contains a similar provision.

Europe, like Turkey. However, a recent draft for a revised Social Charter[123] proposes to extend its scope in a manner similar to that of the E.C.H.R.. It would apply to all persons whatever their nationality, while keeping the condition that they must be lawfully resident or working regularly within the territory of a Party.[124] Finally, note that the Preamble of the Social Charter mentions that the enjoyment of social rights should be secured

> "without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin".[125]

The supervisory mechanism of the Charter is based on biannual governmental reports, analysed by a committee of experts, whose conclusions are submitted to a committee of the Parliamentary Assembly of the Council of Europe and to a sub-committee of the Governmental Social Committee. The conclusions of the latter, together with the report of the committee of experts, are submitted to the Committee of Ministers. This, by a majority of two-thirds of its members, and after consultation with the Parliamentary Assembly, may adopt recommendations. These recommendations and the interpretations of the mentioned committees are not legally binding in formal terms, but governments usually "try to avoid appearing as not fully and correctly implementing the Charter".[126]

(iii) European Convention on Social Security[127]

This Convention, concluded in December 1972, is a complement of the European Code on Social Security,[128] concluded in 1964 also in the framework of the Council of Europe. The latter, in its Article 73, refers to the need for a specific instrument on social security for migrants and aliens, in order to secure the preservation of acquired rights and the establishment of the principle of equality of treatment with nationals of host countries. The European Convention on Social Security was drafted with this aim in mind, and thus is an important contribution to the elimination of legal obstacles for mobility within Europe.[129]

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123 Which would bring together all rights guaranteed in the 1961 Charter and the 1988 Additional Protocol to it.

124 See Council of Europe *Information Sheet-human rights*, No.35, July-December 1994, Strasbourg 1995, at p.106-107. However the governments of the State members of the Council of Europe have not accepted that idea. See the reaction to this of the Standing Committee of the Parliamentary Assembly in Opinion No.185 (1995) on the draft revised European Social Charter, adopted on behalf of the Assembly, on 15 March 1995 - See the Council of Europe *Information Sheet-human rights*, No.36, January-June 1995, Strasbourg, 1995, pp.80-1.

125 Third recital, emphasis added.

126 See Niessen & de Lary de Latour, op. cit., at p. 96.

127 ETS, No.78. It was ratified by Austria, Belgium, Italy, Luxembourg, Netherlands, Portugal, Spain and Turkey. A Supplementary Agreement to this Convention regulates relations between social security institutions and the procedures for the provision of benefits granted by the Convention. The Supplementary Agreement was concluded on the same date and was ratified by the same States that ratified the Convention, ETS, No.78A. In 1994, a Protocol to the Convention was concluded, ETS, No.154. It was signed only by 2 States and has so far been ratified by none.

128 ETS, No.48. It was ratified by 17 States, including Turkey and all Member States, except Austria and Finland. A new European Code of Social Security was concluded in 1990, ETS, No.139. However, it has not yet been ratified by any country, although 14 States have signed it.

129 Plender, op. cit., p.251.

It is an extensive and elaborated document that applies to legislation in several fields of social security: sickness and maternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of occupational injuries and diseases, death grants and unemployment and family benefits.[130] However, the Convention does not apply to social or medical assistance schemes, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants or persons treated as such.[131] The personal scope of the Convention is similar to that of EEC Regulation 1408/71.[132] It applies to all nationals of Contracting Parties and refugees who have been subject to the legislation of one or more such Parties, including self-employed persons. It applies also to survivors of persons subject to such legislation, whatever the nationality of the latter, provided the survivors are nationals of a Contracting Party or refugees or stateless persons. Moreover, it applies also to civil servants and assimilated persons who are subject to the legislation of a Contracting Party.

The Convention establishes the general principle that persons to whom the Convention applies, and who are resident in the territory of a Contracting Party,

> "shall have the same rights and obligations under the legislation of every Contracting Party as the nationals of such Party."[133]

This general principle is subject to some qualifications. For example: the granting of non-contributory benefits, the amount of which does not depend on the length of the period of residence, may, within specific limits, be conditioned to a certain period of residence in the territory of the relevant country. Subsequent provisions of the Convention define the law applicable for each case[134] and deal in detail with each type of benefit and situation.[135] The Convention and its Supplementary Agreement have the objective of making possible the aggregation of benefits, both as far as contributory and non-contributory schemes are concerned. Furthermore, the Convention establishes that periods of insurance completed under the legislation of other Contracting Parties must be taken into account for the acquisition, maintenance or recovery of the right to the benefit. It provides also that the benefits shall be provided in the territory of another Contracting Party.

Only some provisions of this Convention are applicable from its entry into force. The implementation of other provisions depends from the conclusion of subsequent agreements between the Parties, for which the Convention is supposed to function as a model.

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130 Article 2.

131 Article 2(4). See also paragraph (5).

132 Article 2(1). OJ L 149/2 of 05/07/71. This Regulation is analysed later, in chapter 4, section A. The fundamental difference between the personal scope of the two instruments is that in Regulation 1408/71 stateless persons are themselves entitled to rights under the Regulation, which is not the case in the Convention - see Article 4(1)(a) of the latter.

133 Article 8(1).

134 Articles 14 ff.

135 Articles 19 ff.

(iv) European Convention on the Legal Status of Migrant Workers[136]

This Convention was concluded on November 1977 and is in force in 8 countries only: France, Italy, Netherlands, Norway, Portugal, Spain, Sweden and Turkey. It applies to migrant workers who are nationals of one Contracting Party and who have been authorised by another Party "to reside in its territory in order to take up paid employment."[137] However, it does not apply to frontier workers, artists[138] and members of liberal professions, seamen, trainees, seasonal workers, or to workers

> "who are nationals of a Contracting Party, carrying out specific work in the territory of another Contracting Party on behalf of an undertaking having its registered office outside the territory of that Contracting Party".[139]

The Convention provides for protection of such migrant workers in their migration to work in another country (including their recruitment, travel to and establishment in that country), in their life in the host country, and in their eventual return to the country of origin.

As far as their migration is concerned, the Parties undertake to respect the right of migrant workers to leave their country of origin and also their right of admission in another Party to take paid employment there, when the worker has been authorised to take that employment and obtained the necessary documents to that effect. Although these rights are not exactly a major novelty, they are, nevertheless, subject to legal limitations for the protection of "national security, public order, public health or morals". If the recruitment of the worker is made through unnamed requests it shall be effected through an official authority of the country of origin. Before the departure, each migrant worker is to be provided with a contract of employment or a definite offer of employment in the language of the country of origin, and is also to be informed on several aspects of the life and regulations of the receiving country that may be of relevance for the worker and his or her family. Likewise, each Party shall prevent misleading propaganda related to emigration and immigration. Finally, in the case of a official collective recruitment, migrant workers are not to pay the costs of the travel to the receiving country.

As far as their reception and establishment in the receiving country are concerned, there are rules on the issue and renew of work and residence permits and rules on other more general aspects.

When a migrant worker is authorised to take up paid employment in a State, he is to be issued a work permit or to have his or her former one renewed, unless such permit is not necessary. When the work permit is issued for the first time, "as a rule" it may not bind the worker to the same employer or the same locality for more than one year. The renewal of a work permit shall not be for less than one year, but this is so only "as a general rule" and "insofar as the current state and development of the employment situation permits".

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136 ETS, No.93. The Convention was signed on 24 November 1977 and entered in force in 1 May 1983. It was ratified by 8 States: France (with reservations), Italy, Netherlands (with territorial declarations and also with reservations), Norway (with reservations too), Portugal, Spain, Sweden and Turkey.

137 This contrasts with the European Convention on Establishment, which, as mentioned supra, applies also to self-employed persons.

138 Except "entertainers and sportsmen engaged for a short period."

139 Article 1(2) (f).

As far as residence permits are concerned, they are to be issued to migrant workers, when they are required by national legislation and when such workers were authorised to take employment in the country concerned. The validity of the residence permits is, "as a general rule", at least so long as that of their work permit. When the work permit is of an indefinite validity, the residence permit shall, again "as a general rule", be issued or renewed for at least one year. Similar provisions apply also to relatives of the worker authorised to join under the Convention. The residence permits issued according to these rules, may be withdrawn under certain conditions, namely for reasons of national security, public policy or morals; if the holder, conscious of the consequences, refuses to comply with measures for the protection of public health; and also if "a condition essential to its issue or validity is not fulfilled." The Convention regulates also the case in which a migrant worker is no longer in employment, either because he is involuntarily unemployed, or because he is temporarily incapable to work due to illness or accident. In such cases, the worker shall be allowed to remain in the host country for not less than five months for the purposes of re-employment; but even less, if an unemployment allowance is paid to him only for a shorter period.[140]

Under certain conditions, the right to family reunion is provided to the spouse of the worker and to their unmarried children, when these are dependent on the worker and are considered to be minors in the host country law. These workers' relatives are entitled to residence permits under the same rules as those applicable to the workers themselves.

Besides these rules on work and residence permits, the Convention provides that, at their arrival, migrant workers shall be given all appropriate information and advice, as well as assistance necessary for their settlement and adaptation, namely from social services and employment services. The authorities of the host country shall also facilitate to workers and their relatives the teaching of the language of that country.

As far as their life in the host country is concerned, the Convention provides for special protection of migrant workers and establishes the principle that in a wide range of matters migrant workers will be treated equally to nationals of the host country.[141] However, there are often some qualifications to this principle.

The equality of treatment principle applies to social security (subject to rules of national legislation and international treaties); to entitlement to education (including general and higher education, and vocational training and retraining - but not regarding access to scholarships[142]); to matters related to legal proceedings, including legal assistance; to access to housing and rents, insofar as covered by domestic laws and regulations; to inspection of standards of accommodation; to taxation;[143] and to the right

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[140] Article 9.

[141] The duty of equal treatment seems to go beyond the mere enactment of rules equally applicable to nationals and migrant workers and to require equal treatment in practice. This is apparent from the fact that the wording of the provisions insist on the word 'treatment', even when referring to matters which are covered by laws and regulations. Apparently pointing in the same direction, although only in relation to the equality of treatment on working conditions, see Plender, op. cit., p. 256.

[142] In relation to which the Contracting Parties are required only to make efforts to grant children of migrant workers the same facilities of children of the State's nationals. See Article 14(3).

[143] The principle applies to "duties, charges, taxes or contributions of any description whatsoever", and even deductions, exemptions and allowances, including allowances for dependants. Yet, it is not clear whether migrant workers can claim allowances for dependants which do not reside in the host country.

of organising themselves for the protection of economic and social interests. An important rule of the Convention is that in which Parties undertake to ensure that the workers and their families may "worship freely, in accordance with their faith". Likewise, it is also provided that "each Contracting Party shall facilitate such worship, within the limits of available means".

As far as labour matters are concerned, the equality principle applies to working conditions[144] and their inspection; to the application of laws and collective agreements on prevention of industrial accidents and of occupational diseases, and on industrial hygiene; to occupational rehabilitation when a worker has an industrial accident or gets an occupational disease; to the expiry or cancellation of the work contract and on individual or collective dismissals, as regulated by national legislation or collective agreements; and to the use of employment services. Parties shall also facilitate, "as far as possible", the participation of migrant workers in the affairs of the undertakings, on the same conditions as national workers.

In addition to the principle of equal treatment, the Convention provides for specific rights to migrant workers and their families, which take in consideration their situation and needs. The workers are entitled to the transfer of all or such parts of earnings and savings as they may wish, including when they leave the host country. They are to be protected against exploitation in respect of rents (according to relevant laws and regulations). Furthermore, Parties are to "take action by common accord to arrange, so far as practicable" that migrant worker's children are taught the migrant worker's mother tongue. In legal proceedings, migrant workers may obtain an interpreter where they cannot understand or speak the language used in court. If the worker loses his job "for reasons beyond his control, like redundancy or prolonged illness," the competent authorities of the host country "shall facilitate his re-employment, in accordance with national laws and regulations", namely through vocational training and occupational rehabilitation. Finally, each Party shall "take care (...) that steps are taken to provide all help and assistance necessary for the transport to the State of origin of the bodies of migrant workers deceased as a result of an industrial accident".

Special protection is also provided regarding the return of (living) workers and their families to their country of origin. On the return of migrant workers and their families, each Party shall assist them "as far as possible". The host country "shall endeavour to ensure" that vocational training and retraining "cater as far as possible for the needs of migrant workers with a view to their return to their State of origin". Furthermore, the teaching to the children of the worker of the mother tongue of the latter is meant "to facilitate, inter alia, their return to their country of origin". Their State of origin shall provide information on matters relevant for their return - including possibilities of employment, maintenance of social security rights acquired abroad and equivalence of educational and occupational qualifications.

Reservations to the Convention are possible, but not regarding more than nine Articles among its substantive rules. In any case it is not possible to formulate reservations in relation to Articles 4 (right of exit and admission), 8 and 9 (on issue of work and

[144] As regulated by legislative or administrative provisions, collective labour agreements or custom. But there is no possibility to derogate from this equality rule by individual contract.

residence permits), 12 (family reunion), 16 and 17 (working conditions and transfer of earnings and savings), 20 (on prevention of industrial accidents and occupational diseases and on industrial hygiene), 25 (on facilitation of re-employment) and 26 (equality of access to the courts and administrative authorities).

The enforcement system of the Convention is not very strong. The Convention created a Consultative Committee made up of one representative of each Contracting Party. The Committee has the task of examining proposals presented by the Contracting Parties to facilitate or improve the application of the Convention, as well as to amend it. Furthermore, it is charged with preparing periodically for the Committee of Ministers a report on the laws and regulations in force in the Contracting Parties in respect of the matters of the Convention. Opinions, proposals or recommendations of the Consultative Committee are addressed to the Committee of Ministers, which decides on action to be taken. The Consultative Committee has asked the Committee of Ministers to make the mentioned reports public. Parties to the Convention are not legally required to submit reports to the Consultative Committee, but the latter has taken the initiative of asking for such reports, a request which Parties have satisfied.[145]

This Convention covers a very wide range of subjects related to the life of a migrant worker, but has important limits. It does not regulate the access of workers to the labour market of another country, nor does it provide for co-operation between employment services in relation to clearance of vacancies.[146] Besides, the personal scope of the Convention is limited. It only protects nationals of the Contracting Parties and does not protect increasingly important categories of migrant workers: like self-employed workers, frontier and seasonal workers, and even undocumented migrants, who are covered by the UN Convention on All Migrant Workers. Furthermore, often the rights granted by the Convention are formulated and qualified in such a way as to diminish their practical relevance. Some times they are not much more than the repetition of previously acquired rights, like the right to leave one's own country, or to be admitted in a country ...once authorised to work there; or to have diplomas and vocational qualifications recognised ...in accordance with bilateral and multilateral agreements.[147] Moreover, the enforcement mechanism is weak for the position of the worker, as it does not provide, for example, for individual complaints to the Consultative Committee.

There is another noteworthy point. One of the main types of migration envisaged in the Convention is migration for employment whereby workers are hired in their countries of origin through public employment services. The problem is that, although this Convention started to be negotiated in the second half of the sixties, it was concluded in 1977 and entered in force only in May 1983. The importance of this type of migration had been diminishing since the middle of the seventies and virtually disappeared in the eighties.[148] This Convention came too late to be of a crucial importance to migrants in

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145 Niessen & de Lary de Latour, op. cit., at p. 100.

146 Plender, op.cit., p.251.

147 Article 14(4).

148 Niessen & de Lary de Latour, op. cit., p. 97. It may also be recalled that in the eighties Greece, Portugal and Spain acceded to the European Communities. The legal status of their immigrants in Member States was from there onwards regulated by Community Law.

Europe. This is particularly true for the status of third country nationals in Member States. Among the present parties to the Convention, only in respect to Turkey are the rules of the EC Treaty, or of the EEA Agreement not in force.

(v) Convention on the Participation of Foreigners in Public Life at Local Level[149]

A quite interesting instrument adopted within the Council of Europe is the Convention on the Participation of Foreigners in Public Life at Local Level. Its Preamble states that this Convention was based, inter alia, on the fact that "the residence of foreigners on the national territory is now a permanent feature of European societies". Moreover, the Preamble declares that the Contracting Parties were convinced of the "need" to improve the participation of foreign residents in the local community, "especially by enhancing the possibilities for them to participate in local public affairs".

The Convention applies therefore to "foreign residents", and according to its Article 2, this term means "persons who are not nationals of the State and who are lawfully resident on its territory".

The substantive provisions of the Convention are divided in three chapters: Chapter A, on freedom of expression, assembly and association, and on involvement in processes of consultation on local matters; Chapter B, on the creation of consultative bodies to represent foreign residents at local level; and Chapter C, on the right to vote and to be elected in local authority elections.

Only Chapter A is obligatory. By a declaration on the occasion of the deposit of the instrument of ratification,[150] the Contracting Parties may declare that they are not bound by Chapter B of the Convention, or by its Chapter C, or by neither of them. This last possibility may appear slightly odd as the innovative content of Chapter A is not very substantial.

In Chapter A, Article 3 provides that each Party guarantees to foreign residents the rights to freedom of expression, of peaceful assembly, and of association (including to form and to join trade unions),"on the same terms as to its nationals". The rights to these freedoms are defined in the same manner as that made in the corresponding provisions of the E.C.H.R.[151] However, Article 3(b) adds that the right to freedom of association shall imply the right of foreign residents to form and join "local associations for their own purposes of mutual assistance, maintenance and expression of their cultural identity or defence of their interests", but only "in relation to matters falling within the province of the

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[149] ETS, No.144.

[150] Or the instrument of acceptance, approval or accession, as the case may be.

[151] Article 3(a) of the Convention on the Participation of Foreigners in Local Life (providing for freedom of expression) is equivalent to Article 10(1) of the E.C.H.R. Moreover, the first phrase of Article 3(b) of the former Convention (providing for freedom of peaceful assembly and of association) is based on Article 11(1) of the E.C.H.R. Likewise, the restrictions made by the Convention on the Participation of Foreigners to the rights to such freedoms - in its Article 9(2) and 9(3), respectively - are based on the restrictions made to the corresponding provisions of the E.C.H.R. - Article 10(2) and Article 11(2) of the latter, respectively. Note, however, that there is a slight difference between Article 11(2) of the E.C.H.R. and Article 9(3) of the Convention on Participation of Foreigners. The latter does not provide that the exercise of the right to peaceful assembly and to association can be restricted by law in the case of members of the armed forces, of the police (who usually are not foreigners) or of members of the administration of the state (who can more easily be foreigners). Under Article 11(2) of the E.C.H.R., such restriction is possible.

local authority". The other provision of chapter A, Article 4, provides that each Contracting Party "shall endeavour to ensure that reasonable efforts are made" so that foreign residents are involved "in public enquiries, planning procedures and other processes of consultation on local matters".

Chapter B regards the creation of local bodies of a consultative type to represent foreigners. Each Party is bound to ensure that there are no legal obstacles to prevent local authorities from setting up such bodies, in areas where "there is a substantial number of foreign residents". Those bodies, or other "appropriate institutional arrangements", refer to bodies designed to form a link between the local authorities and foreign residents, to discuss and express opinions of foreign residents on matters of the "local public life" (including those related to the local authority concerned), and, in general terms, to foster the integration of foreign residents "into the life of the community". Each Party shall also encourage and facilitate the establishment of such consultative bodies, and ensure that foreign residents, or their associations, can elect or appoint representatives to those bodies.

Chapter C is the most innovative of the Convention. It provides for the right of foreign residents to vote and to be elected to local authorities. Article 6 provides that this right is granted to "every foreign resident", provided that he or she fulfils the same legal requirements applicable to nationals, and has been a "lawful and habitual resident" in the State for five years preceding the elections. Provision is made so that this period may be shortened, either unilaterally, or by bilateral or multilateral agreement. On the other hand, by a declaration on the occasion of deposit of the instrument of ratification, a Party may declare that a foreign resident can only vote in elections to local authorities, but cannot be elected to them. Likewise, according to Article 15, although the provisions of the Convention apply in principle to "all categories of local authorities existing within the territory of each Party", when ratifying the Convention a Party may delimit the "territorial authorities" to which the Convention applies, or exclude some of such authorities from the scope of the Convention.

Also of relevance is Article 8, according to which the Parties shall endeavour to ensure that information is available to foreign residents on their rights and obligations in relation to local public life.

Finally, according to Article 9(1) of the Convention, the rights accorded to foreign residents may be subject to further restrictions, "in time of war or other public emergency threatening the life of the nation". It is, nevertheless established that these restrictions shall not go beyond "the extent strictly required by the exigencies of the situation".[152] On the other hand, Article 9(5) establishes that the Convention does not affect any other more favourable provisions on the rights granted by it.

This Convention is a very innovative instrument of international Law. Its innovative character regards particularly the fact that is a multilateral instrument granting to "every foreign resident" the right to vote and to be elected for local authorities. However, although it was concluded in 1990, the Convention has been yet ratified only by

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[152] Article 17 provides that no other reservations may be made to the Convention, apart from the ones mentioned - which include the limiting and derogatory clauses explained in the main text, as well as the possibility to exclude Chapters B, or C, or both, from the commitment undertaken under the Convention.

Italy, Norway and Sweden.[153] It is not in force, since four ratifications are required for this to occur.[154]

(vi) Framework Convention for the Protection of National Minorities[155]

The Framework Convention for the Protection of National Minorities was opened for signature in February 1995. It was announced as the "first international treaty exclusively devoted to the protection of national minorities to establish substantive legal principles and to incorporate a monitoring mechanism under international law for their implementation".[156] The Convention is indeed a very useful element for the protection of national minorities, at least potentially. However, there was no consensus to define what is a national minority for its purposes. Some authors suggest that the Convention does not protect national minorities with a ethnic link to another country.[157] In this case the Convention is not relevant for the purposes of this thesis; except to the extent that it may highlight the difference in the protection afforded to different minorities, according to whether or not their origin is within the boundaries of the relevant country.[158]

(vii) Other Conventions

There are other Conventions of the Council of Europe which may be of interest with regard to the legal status of some third country nationals in the Member States of the European Union. These Conventions concern, for example, specific aspects of movement of persons between States members of the Council of Europe,[159] and the equivalence of educational periods or diplomas, as well as the facilitation of such studies abroad.[160]

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[153] Denmark, Netherlands and the United Kingdom did sign the Convention, but did not ratify it yet.

[154] Article 12(1) of the Convention.

[155] Adopted by the Committee of Ministers on 10 November 1994, doc. H (94) 10. It was opened for signature on 1 February 1995. Up until October 1995 it had been ratified by Hungary, Romania, Slovakia and Spain and signed by 28 States including all Member States, except Belgium, France, Greece and Luxembourg. For its text see Council of Europe *Information Sheet-human rights*, No.35, July-December 1994, Strasbourg, 1995, at p.147-153, and also *HRLJ*, Vol. 16, 1995, No.1-3, pp.98-115, including an explanatory memorandum to the Convention, at pp.101-108; and a comparative table with the Parliamentary Assembly proposal for an additional protocol to the E.C.H.R., at pp.108-115. See also the introduction to the Convention made by Klebes, H., idem, pp.92-98. Note that there is also a European Charter for regional or minority languages, of 5 November 1992, ETS, No.148. It is not in force and has been yet ratified only by Finland, Hungary and Norway. While this Charter is a positive document for the protection of the rights related to the use of minority languages, it has been criticised for implying "acceptance of the policy of assimilation for 'newcomers', rather than integration". In fact, not only is the protection of the Convention limited to nationals of the ratifying States, but it also allows these States to limit the protection of accepted provisions to users of only certain languages. Finally, it excludes languages of migrants from its protection. See Gomien, D. "The Rights of Minorities ...", op. cit., at p.59. See also Packer, John & Myntti, Kristian (eds.) *The Protection of Ethnic and Linguistic Minorities in Europe*, Institute for Human Rights - Åbo Akademi University, Turku/Åbo, 1993; and Miall, Hugh (ed.) *Minority Rights in Europe: The scope for a transnational regime*, London, Pinter, 1994.

[156] See Council of Europe *Information Sheet-human rights*, No.35, July-December 1994, Strasbourg 1995, at p.80.

[157] See Klebes, op. cit., p. 93. Cf. also with Capotorti, op. cit. at pp.95-6.

[158] In the sense that "our" national minorities are considered more worthy of protection than "foreign" national minorities living among us.

[159] European Agreement on Regulations Governing the Movement of Persons Between Member States of the Council of Europe, of 1957, ETS, No.25 (ratified by 13 States, including Turkey and all Member

Final remarks - section B

Some remarks can be added to the analysis above made of international multilateral instruments relevant for the legal status of third country nationals in Member States.

First, there are plenty of sources of inspiration to provide legal protection to their rights and interests. The most interesting Conventions for such purposes include the UN Convention on the Protection of All Migrant Workers, the ILO Conventions No.97 and No.143, the European Convention of Human Rights, the European Convention on the Legal Status of Migrant Workers, and the European Convention on the Participation of Foreigners in Public Life at Local Level. These Conventions contain a wide range of provisions protecting the situation of migrant workers, or that of simple foreigners, most of which could well be emulated to protect rights and interests of third country nationals.

Secondly, the practical interest of the most protective Conventions is considerably reduced by their concrete personal scope, by the wording of their provisions and by their weak system of enforcement.

As far as their personal scope is concerned, they often apply only to legal residents who are nationals of the Contracting Parties. That is not always the case of the UN and ILO Conventions, but it is a rule among the Conventions of the Council of Europe, the E.C.H.R. being the exception.[161] Furthermore, the fact that so few States ratify the most protective Conventions gives food for thought.[162] Among the relevant Conventions of the Council of Europe, most have not been ratified by all the Member States of the European Union. Some times this is particularly striking, e.g. when the objectives of the Conventions

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States, except Denmark, Finland, Ireland, Sweden, and the United Kingdom); and the European Agreement on Travel by Young Persons on Collective Passports Between the Member Countries of the Council of Europe, of 1961, ETS, No.37, (ratified by 17 States, including Turkey and all Member States except Austria, Finland and Germany).

[160] See the European Convention on the Equivalence of Diplomas Leading to Admission to Universities of 1953, ETS, No.15 (in force in 31 States, including Turkey and all Member States); the Protocol to it of 1964, ETS, No.49 (in force in 24 States, including all Member States, except Greece, Ireland and Spain); the European Convention on the Equivalence of Periods of University Study, of 1956, ETS, No.21 (in force in 27 States, including Turkey and all Member States, except Greece); the European Convention on the Academic Recognition of University Qualifications, of 1959, ETS, No.32 (in force in 26 States, including all Member States, except Greece and Luxembourg); the European Convention on the General Equivalence of Periods of University Study, of 1990, ETS, No.138 (ratified by 14 States, including all Member States other than Belgium, Denmark, Greece, Luxembourg, Portugal, Spain and the United Kingdom). See also the European Agreement on Continued Payment of Scholarships to Students Studying Abroad, of 1969, ETS, No.69 (in force in 18 States, including all Member States, except Belgium, Denmark, Greece, Ireland, Italy and Portugal).

[161] Together with the European Convention on the Participation of Foreigners in Public Life at Local Level, as referred to supra, in the main text.

[162] The UN Convention on the Protection of All Migrant Workers has not yet been ratified by any Member State; the ILO Convention No.143 was ratified only by 3 Member States; the European Convention on the Legal Status of Migrant Workers is in force in 8 countries only (in 6 Member States, and in Norway and Turkey); and the Convention on the Participation of Foreigners in Public Life at Local Level is not yet in force, due to lack of sufficient ratifications. Only the E.C.H.R. and the European Social Charter were ratified by all Member States.

are not very ambitious, as is the case of European Convention on the Legal Status of Migrant Workers. On the other hand, it is relevant that Turkey has ratified some of the Council of Europe Conventions. Furthermore, after the entry of Central and Eastern European countries in the Council of Europe, the relevance of the Conventions adopted within the latter increased substantially, inasmuch as such countries did or may ratify them. As far as the substantive rules of the Conventions are concerned, they are often carefully worded and qualified when granting rights to foreigners. Their practical interest to the effective protection of rights varies accordingly. In what relates to the mechanism for supervision of the Conventions' enforcement, only the E.C.H.R. provides for a strong and legally binding enforcement mechanism. The problem is that, in spite of its considerable relevance for third country nationals, the E.C.H.R. can only provide them protection in a rather limited area.

In a conclusion, there is a difference between the general, long term importance of the relevant international treaties, and their practical, immediate relevance. The international instruments analysed are quite rich in their potentialities, and as a source of inspiration; but are weaker in what relates to the actual protection they provide for. They can provide minimum and optimal guidelines which may be useful to protect and develop rights at a national and European Union level. However, it comes as no surprise that international treaties are not sufficient to ensure appropriate protection of the rights of third country nationals in the European Union.

Chapter 2

COMMUNITY COMPETENCE
ON THIRD COUNTRY NATIONALS

INTRODUCTION

Does the European Community have powers to adopt measures on third country nationals? A common view among European politicians and some legal literature sustains that the Community does basically not have competence to act on third country nationals.[1] This presumed lack of competence has been often used as an argument to refuse the adoption of Community measures on third country nationals, as well as to explain why so few of them were adopted. The aim of this chapter is to analyse the legal validity of the assertion on the Community's lack of competence. The chapter concentrates on analysing the provisions of the EC Treaty, in order to determine whether, and to what extent, the European Community has competence to take legal measures exclusively or primarily related to third country nationals.[2]

This chapter will make only a brief reference to the new Community competences in relation to third country nationals, that were introduced by the Treaty on European Union. These new competences will be analysed in chapter 7, which deals with the new legal and institutional framework introduced by the Treaty on European Union. The activities based on those new competences are examined in chapters 8 and 9.

The chapter is divided in five sections. Section A will look for EC Treaty provisions which could form the basis of a specific Community competence for adoption

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[1] Exceptions are some times made to such a generic assessment, namely regarding Article 59(2) of the EC Treaty (which was never used) and the new competences on visas introduced by the Treaty on European Union. Nevertheless, these exceptions do not diminish the importance of and emphasis on the general assertion.

[2] For specific works on Community competence in relation to third country nationals, see Cruz, A., *Community Competence over Third Country Nationals Residing in an EC Member State*, Brussels, CCME Briefing Paper No.5, September 1991; Hubeau, B. &. Van Put, R. "Les compétences des Communautés en matière d'immigration", *Revue du droit des étrangers*, 1990, No.58, p.71; Plender, Richard "Competence, European Community Law and Nationals of Non-Member States", *ICLQ*, 1990, No.39, pp.599-610. Other works deal with the issue of Community competence when analysing more general legal issues in EC Law related to third country nationals: see, e.g., Böhning, W. R. &. Werquin, J. , *Le futur Statut des Nationaux des Pays-Tiers dans la Communauté Européenne*", Brussels, CCME, Briefing Paper No.2; 1990; Delgado, M. Isabel Lirola, *Libre Circulación de Personas y Unión Europea*, Madrid, Editorial Civitas, 1994, at pp. 195-201; Reischle, Matthias, *The Legal Status of Non-EU Nationals residing in the European Union from a Community Law perspective*, Bruges, College of Europe, April 1994, paper for the Master's Degree, at pp.28-36; Timmermans, C.W.A. "Free Movement of Persons and the Divisions of Powers Between the Community and its Member States - Why do it the intergovernmental way?", in *Free Movement of Persons in Europe: Legal Problems and Experiences*, T.M.C. Asser Institute Colloquium on European Law, Session XXI, 1991, Schermers, H.G. et al. (eds.), Dordrecht, Martinus Nijhoof, 1993; pp.352-368, particularly at pp.361-364. For a general overview of the issue of Community competence see Snyder, F. "Competences", in *Butterworths Expert Guide to the European Union*, O'Keeffe, D., Neuwahl, N. & Monar, J. (eds.), Butterworths, London, forthcoming. Relevant for the issue of Community competence on third country nationals are also the works of Heaton, Ricou "The European Community After 1992: The Freedom of Movement of People and Its Limitations", *Vanderbilt Journal of International Law*, Vol. 25, November 1992, No.4, pp. 643-679, and Govaere, Inge & Martiniello, Marco "Place de l'Immigration et Politiques Migratoires dans l'Europe de Demain - Quelques elements de réflexion", *Contradictions*, No.56, 1989, pp.143-159, in particular at pp.149-155.

of EC measures on third country nationals. It will be seen that only a few EC Treaty provisions are specifically and explicitly related to issues concerning third country nationals. Thus, Section B, will proceed in the search for a legal justification for adoption of such measures. This section aims to determine how issues concerning third country nationals relate to the achievement of Community objectives. This will be analysed in the light of, firstly, the original version of the EEC Treaty; secondly, the objective of establishing a single market "without internal frontiers" provided by the Single European Act; and, thirdly, the Treaty on European Union. In section C the legal justification for the adoption of EC measures on third country nationals will be examined in the light of the subsidiarity principle. This is the sole aspect of the Treaty on European Union to be examined in relative depth in this chapter, and not in chapter 7. This is due to the fact that the subsidiarity principle is important for Community activities in general terms, and does not have a narrow scope like Article 100C, for example. Section D will analyse EC Treaty provisions for the adoption of measures of narrow scope concerning third country nationals. Particular attention will be made to Article 118 and the case Germany et al v. Commission.[3] Section F will examine decision-making procedures which could form the basis for the adoption of measures with general scope concerning third country nationals. It will explore the possibilities of using Article 100 and Article 235 of the EC Treaty to adopt measures on third country nationals. It will refer in particular to the use of these provisions to justify EC action in other areas in which the competence of the Community was not explicitly provided for in the EC Treaty. Article 238 will also be analysed in section F, in the context of the Community external competence to act on the legal status of third country nationals in Member States. Finally, some conclusions will be proposed on the issue of the Community competence in relation to third country nationals.

Naturally, there are a number of other important questions relevant to the discussion of EC competence in relation to third country nationals. However, for the sake of convenience they will not be treated here, but in other chapters. In this way, a legal obligation incumbent on the Community to take measures on third country nationals will be analysed and argued for in the next chapter, when interpreting Article 7A of the EC Treaty and examining its precise legal effects. In chapter 4 the personal scope of Article 48 of the EC Treaty will be analysed. Chapter 6 will refer how Community competence on third country nationals relates to the activities developed in intergovernmental cooperation. As mentioned above, Chapter 7 will analyse the relations between the competence of the European Community and of the European Union, in particular as far as the Cooperation established under Title VI is concerned.

However, further elaboration is still necessary on the exact scope of the EC competence to be examined in this chapter.

Firstly, it should be noted that the search here is for provisions of the Treaty which could be a basis for the adoption of measures exclusively or primarily related to third country nationals. Only in section C of chapter 4, not in this chapter, I will refer to provisions under which measures can be taken on certain groups of persons, in part

[3] Joined cases 281, 283 to 285 & 287/85, Germany, Netherlands, France, United Kingdom & Denmark v. Commission [1987] ECR 3203.

constituted by third country nationals, but which were not adopted with third country nationals primarily in mind. Examples of these measures are the Community instruments on health and safety at work. They apply not only to workers who are nationals of a Member State, but also to workers who are nationals of third countries. Nevertheless, these instruments were not adopted with the specific situation of third country nationals in mind, but that of workers in general.

Secondly, as far as the subject scope of the measures under analysis is concerned, EC competence will be examined in relation to immigration from third countries to the Member States and in relation to the legal status of third country nationals in the Community. Immigration from third countries to the Community is relevant here, in principle, regardless of the purposes and duration of such immigration. Community competence may be discussed in relation to workers coming from third countries[4] (on a temporary or a permanent basis). However, it may also be analysed in relation to relatives of such workers or simple tourists entering the Community. The sole issue which, in principle, is beyond the scope of this thesis, is the right of asylum and the situation of asylum-seekers and refugees.

For the purposes of this chapter, the legal status of third country nationals in the Community includes issues that relate specifically to them - like equality of rights with nationals of member States - and issues that concern them in a primarily but not exclusive way - like the fight against racism. Their legal status is in principle also relevant either when their rights are examined at a national level (racism, discrimination and access to the labour market) or at a broad Community level (e.g. free movement among Member States).

Finally, it may be noted that the analysis here undertaken of the Community competence, both on immigration from third countries and on the status of third country nationals in the EC, will also pay attention to how those two fields relate to the implementation of a complete free movement of persons within the European Community.

A) SEARCH FOR A SPECIFIC COMPETENCE ON THIRD COUNTRY NATIONALS

In the Community legal system the point of departure is the competences of the Member States. It is usually said that the Community is based on the principle of limited powers ("compétences d'attribution").[5] It may only act when specific provisions of the Treaties attribute it the power to take decisions. It has no inherent powers. The provisions of the Treaties define the specific fields for action and the procedure for the adoption of measures.[6] In certain cases the competence attributed to the Community is an exclusive

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[4] One of the main concerns of this thesis.

[5] See Hartley, T.C. *The Foundations of European Community Law*, second edition, Oxford, Clarendon Press, 1988, at pp.102-104, Kapteyn, P. J. G. & Verloren Van Themaat, P., *Introduction to the Law of the European Communities*, 2nd.ed., Deventer, Kluwer, 1989, pp.112-113, and Snyder, F., "Competences", "Division of powers", and "Implied Powers", in *Butterworths Expert Guide to the European Union*, op.cit..

[6] The alternative would be a general authorisation to act within the scope of certain pre-defined areas.

competence. The Member States have no competence to act in a given area, except to the extent and according to the procedures provided for by Community Law. Such is the case with external commercial policy and with agriculture.

It is more than clear that there is no exclusive general Community competence in relation to issues concerning third country nationals. Furthermore, there was no provision in the original Treaty of Rome expressly granting competence to the European Community to adopt measures specifically related to third country nationals.[7] Most of the legal difficulties in establishing a Community competence on third country nationals rest on that fact. The only exception to this assessment is Article 59(2), which envisages the possibility of extending to third country nationals the provisions of the Treaty chapter on free provisions of services. However, even if this provision is grounds for sustaining that third country nationals are not beyond the scope of Community Law, the provision itself has a narrow scope. It can only deal with one of the many issues related to third country nationals. Furthermore, according to the prevailing view, Article 48 of the Treaty does not apply to third country nationals when it provides for freedom of movement for "workers" in general terms, or when it envisages "the abolition of any discrimination based on nationality between workers of the Member States".[8]

The Treaty on European Union introduced a number of specific Community competences on third country nationals. First, a new Article 100C allows the Community to determine the third countries whose nationals must have a visa to cross the external borders of the Community, and entitles it to define a uniform format of visas. Secondly, an Agreement on Social Policy concluded between all Member States (except the United Kingdom) entitles the Council to adopt, by unanimity, Directives on "conditions of employment for third country nationals legally residing in Community territory".[9] Chapter 7 will analyse the new Community competences on third country nationals introduced by the Treaty on European Union, while chapter 8 will examine Community visa legislation adopted under Article 100 C. The possibility provided by the Agreement on Social Policy to adopt legal binding measures on third country nationals has not yet been used.

This fact, together with the narrow scope of Article 100 C, can lead us to conclude that there is no general specific or explicit Community competence to deal with issues concerning third country nationals.

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[7] See, however, Articles 131 to 136 (on association with the overseas countries and territories), and 238 (on association agreements with third countries or an international organisation) of the Treaty of Rome. See also that, in any case, third country nationals are not entirely out of the scope of Community Law, as will be demonstrated in chapter 4, in particular in its section C.

[8] See infra the analysis on the personal scope of Article 48, in chapter 4.

[9] See Article 2(3) of the Agreement on Social Policy annexed to the Protocol. The Directives will define "minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States" - Article 2(2) of the same Agreement. As will be recalled again in chapter 7, the Protocol on Social Policy was signed by all Member States, including the United Kingdom, authorising 11 Member States to use the Community institutions to act on the domains mentioned in the Social Policy Agreement, including those referred to supra concerning third country nationals. Note also that third country nationals resident in the Community may also submit petitions to the European Parliament, as well as to present complaints to the European Ombudsman, accordingly to the new Articles 138d and 138e of the EC Treaty, respectively.

B) COMMUNITY OBJECTIVES AND JUSTIFICATION OF EC MEASURES ON THIRD COUNTRY NATIONALS

In any case, the adoption of Community measures on third country nationals seems to be justifiable due to the relevance of issues concerning them for the attainment of Community objectives.

1 - The original legal framework

As we have seen, in the original Treaty of Rome there was a lack of provisions to act specifically on third country nationals. Nevertheless, it is important to emphasise that issues concerning third country nationals did already relate to the objectives and the activities of the Community, as defined by the original version of that Treaty. This seems particularly clear in the light of the Community objectives defined in its Preamble and Articles 2 and 3. The Preamble of the original Treaty of Rome mentions that the founding Heads of State decided to create a European Economic Community, inter alia, under the following circumstances:

> being "Determined to lay the foundations of an ever closer union among the peoples of Europe,
>
> Resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,
>
> Affirming as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples,
>
> Recognising that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,
>
> Anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions (...) [and] Resolved by thus pooling their resources to preserve and strengthen peace and liberty(...)"

Article 2 of the Treaty stated that:

> " The Community shall have as its tasks, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."[10]

Article 3 provided that:

> " For the purposes set out on Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: (...)

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[10] The new version of Article 2 of the EC Treaty, as amended by the Treaty on European Union, reads as follows: "The Community shall have as its tasks, by establishing a common market and an economic and monetary union and by implementing the common policies and activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital; (...)
(f) the institution of a system ensuring that competition in the common market is not distorted;
(g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;
(h) the approximation of the laws of the Member States to the extent required for the proper functioning of the common market;
(i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;(...)."
"(k) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development".[11]

Issues concerning third country nationals could, already under the original version of the Treaty of Rome, be related to the objectives and activities of the Community in two different ways, distinguishable more easily in conceptual terms than in practice. One is the relation between issues concerning third country nationals and the strict economic aspect of the Community. The immigration and legal status of third country nationals are directly relevant to "economic progress", to "a harmonious development of economic activities" and to the establishment of a "common market" - in which "obstacles to freedom of movement for persons, services and capital" are to be abolished and "fair competition" ensured. Another aspect is the fact that the improvement of the social and legal situation of third country nationals is certainly part of the general "social progress" of the Community. If it is true that the Member States want "to preserve and strengthen peace and liberty" and to promote "an accelerated raising of the standard of living", they cannot be indifferent to the situation of those persons in the Community.

A more general argument can also be made, partly based on this last "social progress" aspect of Community objectives. Third country nationals residing in the Community for a long time constitute a considerable number of persons, whose work and imagination contribute to the achievement of Community objectives. It would be appropriate to entitle them to EC rights, namely those related to the free movement of

[11] This last alinea is relevant in so far as the association of such countries and territories with the Community may concern third country nationals in the EC. Meanwhile, note that Article 3 of the EC Treaty, as amended by the Treaty on European Union, did not fundamentally change this provision, but reinforced it, insofar as Article 100C on visas is concerned. The new version of Article 3 refers to the following Community activities: "(c) an internal market characterised by the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital; (d) measures concerning the entry and movement of persons in the internal market as provided for in Article 100C; (...) (g) a system ensuring that competition in the common market is not distorted; (h) the approximation of the laws of the Member States to the extent required for the proper functioning of the common market; (i) a policy in the social sphere comprising a European Social Fund; (j) the strengthening of economic and social cohesion; (...) (o) a contribution to the attainment of a high level of health protection; (...) "(r) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development".

persons.[12] To grant them these rights would entail extending the scope of EC legislation to include them, or to adopt specific measures in their favour. Granting such rights seems to be particularly justified inasmuch as the Community being a Community based on the rule of Law,[13] is bound by the equality principle, which is a general principle of Public International Law.

2 - Community objectives after the Single European Act

The new EEC Treaty provisions introduced by the Single European Act reinforced the relationship between issues concerning third country nationals and Community objectives.

The most important of such new provisions was Article 7A,[14] which provides that:

> "The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article 7b, 7c, 28, 57(2), 59, 70(1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.
> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with provisions of this Treaty. "

a) the single internal market project in context

This provision, like the whole Single European Act, is the result of the historical evolution of the Community in the seventies and eighties. The wish for progress in the process of European integration had produced several concrete proposals for institutional change and substantive action.[15]

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[12] See O'Keeffe, D. "The Free Movement of Persons and the Single Market", *ELR*, Vol. 17, 1992, No.1, pp.3-19, at 17.

[13] See case 294/83 Les Verts v. European Parliament [1986] ECR 1339, paragraph 23; and Opinion 1/91 on the EEA Agreement, [1991] ECR I-6079, paragraph 21.

[14] The original number of this provision was Article 8A. After the Treaty on European Union, this provision was numbered as Article 7A of the EC Treaty. For the sake of simplicity, it will be referred to here as Article 7A, with its present number.

[15] See, e.g. the Tindemans report (Bull. EC, Supplement 1/1976), the "Three Wise Men report" (requested by the Brussels European Council of 1978 to Borend Biesheuval, Edmund Dell and Robert Marjolin - see Agence Europe, No.4117 (new series), of 26 June 1985, p.13.), and a draft "European Act", presented in 1981 by the German and Italian foreign ministers, respectively Genscher and Colombo. The latter proposed an improvement in the Community institutional aspects and an intensification and expansion of cooperation on the way to the European Union. See Kapteyn & Verloren Van Themaat, op.cit., p.26. This challenge was not adequately met by the European Council. In its meeting in Stuttgart, in June 1983, it adopted only a "Solemn Declaration on European Union", which was more a declaration of policy intentions and procedures to be applied, than a contribution to towards institutional change; Bull. EC, 6/1983, pp.24-9. Meanwhile, a movement led by Spinelli, within the European Parliament, prepared a "Draft Treaty Establishing the European Union", adopted by the European Parliament by 237 votes in favour, 31 against and 43 abstentions, on 14 February 1984, OJ C 77/33, of 19/3/1984. This Draft Treaty was federalist oriented and presented several ambitious proposals, a part of which would only be adopted much later, in the 1992 Treaty on European Union. The Parliament's Draft Union Treaty of 1984 proposed to change the Community into a European Union (with its own legal personality) and to set a global constitutional framework for the Union institutions and activities. The Draft Treaty would establish a European citizenship for the nationals of Member States, and provided for the protection of human rights within the Union jurisdiction. It proposed also that a complete "free movement of persons and

The Fontainebleau European Council of June 1984 set up the Dooge Committee, on institutional affairs and the Adonnino Committee, on "a people's Europe".

The **report of the Dooge Committee** was concluded in March 1985. Not all members of the Committee agreed with all proposals put forward, this partial disagreement reflecting the diverging opinions of Member States on the need and manner in which to progress forwards. In any case, a majority of the Committee suggested the creation of a European Union as a true political entity. It proposed the establishment of a true internal market to accomplish the EEC Treaty objectives, the reinforcement of the European Monetary system, and the building up of an external entity. In institutional terms it suggested a political cooperation even on security and defence matters, a generalised use of the majority rule in the Council, a co-decision legislative power of the European Parliament. To put its proposals into practice, the Dodge Committee proposed convening an intergovernmental conference to negotiate a Union Treaty, on the basis of the acquis communautaire, the Stuttgart declaration on the European Union, and having in mind the spirit and method of the Parliament's Draft Union Treaty of 1984.

The final **report of the Adonnino Committee**[16] suggested the adoption of measures in a wide range of fields. The proposals had a quite different intrinsic value as well as consequences. It proposed, for example, a uniform electoral procedure for the elections to the European Parliament, voting rights in European and local elections for citizens of one Member State living in another, and consular cooperation in third countries for the protection of EC citizens in countries where its own Member State did not have diplomatic representations. It proposed measures also in the field of culture and information and for exchanges of university students, professionals and young people. Finally, it included measures such as "the strengthening of the Community's image and identity", with the use of a European flag and a European anthem.

Both the report of the Dooge Committee and of the Adonnino Committee were examined by the Milan European Council of June 1985, the one which endorsed the **White Paper of the Commission on "Completing the Internal Market".**[17]

This document was presented by the Commission on June 1985, as a reply to the request of the European Council of March 1985, that the Commission presented concrete proposals for the completion of "a single large market".[18] The Commission presented a White Paper with a plan for finally completing a true internal market by the end of 1992.

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goods" to be accomplished within two years after the entry into force of the Treaty. It was pointed out that "this [free movement] implies in particular the abolition of personal checks at internal frontiers" (Article 47(3), third indent). On the institutional side, it would establish clearer rules on the division and exercise of competences of the Union and of the Member States, it would give more legislative powers to the European Parliament, diminish the blocking powers of the Member States in the Council, and increase the supervisory powers of the Court of Justice.

[16] Agence Europe, No.4117 (new series), of 26 June 1985, p.13.

[17] "Completing the Internal Market", White Paper of the Commission to the European Council of Milan, 28 and 29 June 1985, COM (85) 310 final, of 14/6/1985.

[18] It emphasised, as one of the fields for action, the one: "to achieve a single large market by 1992 thereby creating a more favourable environment for stimulating enterprise, competition and trade; it called upon the Commission to draw up a detailed programme with a specific timetable before its next meeting". See Bull. EC, 3/1985, point 1.2.3., p.12. The following meeting of the Council took place in June 1995 in Milan, where the White Paper was endorsed. See also the several calls of the European Council to the Commission mentioned in p. 3 of the White Paper, quoted supra.

The White Paper proposed the Council to adopt of a wide range of measures meant, on one hand, creating conditions for effective competition throughout the Community and, on the other hand, abolishing completely any border controls among the Member States.[19] Border controls of persons were also supposed to be abolished.[20] Therefore, the plan envisaged the adoption by the Community of acts on police and public order related matters. Among such acts there were Directives for the approximation of firearm's legislation,[21] of drugs legislation[22] and on the coordination of rules on extradition.[23] The abolition of border controls would also concern third country nationals. The Commission would present, until the end of 1988, several draft Directives with the aim of coordinating national rules: on the legal status of third country nationals, on the right of asylum and refugee status, and on visas. They were supposed to be all approved by the Council by the end of 1990.[24] The White Paper was endorsed by the European Council of Milan, in June 1985, with no reservations.[25]

In the following month, July 1985, the General Affairs Council agreed on the details of an intergovernmental conference to revise the Treaties of the European Communities and to draft a treaty "on common foreign and security policy".[26] An Inter-Governmental Conference was held in the autumn of 1985, and in December 1985, in Luxembourg, the European Council reached agreement on an institutional reform of the European Communities. This agreement materialised in the Single European Act, which amends and completes the EC's Treaties, in a further step towards a European Union. The result of this conference was the European Single Act, which also formalised the aim of achieving an internal market by 1993, as suggested by the Commission's White Paper. It entered into force on 1 July 1987.

As we have seen, there was no lack of ideas or of concrete proposals for progress in European integration. However, the adoption of the European Single Act (and to some extent also of the Commission's White Paper) gave only partial satisfaction to the desire for progress and it accepted only part of the proposals with that aim which were on the table at the time.

b) EC measures on third country nationals and the internal market

Nevertheless, the historical background is useful to recall that the European Single Act was meant to constitute a substantial step in the process of European integration, towards a European Union.[27] In this light, Article 7A is of fundamental importance. The correct interpretation and the precise legal effects of this Article will be analysed in detail

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[19] The Commission stated that its "objective is not merely to simplify existing procedures, but do away with internal frontier controls in their entirety." See the White Paper of the Commission, quoted supra, point 27.

[20] Idem, p.14-16.

[21] To be adopted by 1988.

[22] To be adopted by 1989.

[23] To be adopted by 1991.

[24] Commission's White Paper on "Completing the Internal Market", quoted supra, point 55 and annex, pg. 12.

[25] Bull. EC, 6/1985, p.14-5.

[26] Bull. EC, 7/8 1985, p. 9.

[27] See the first recital of the Preamble of the Single European Act.

in the next chapter. Here it is important to emphasise that, with this new provision, it seems more obvious than before that it is appropriate for the EC to take measures relating to third country nationals.

The importance of Article 7A for EC competence with respect to third country nationals goes as follows. It provides for the establishment of an internal market comprising "an area without internal frontiers" with free movement of persons and services.[28]

This single internal market was supposed to be established by the Community. For this purpose the Community would in principle adopt the measures envisaged in the Commission White Paper of 1985. An authoritative confirmation of this idea was given by two sources. One is the endorsement by the European Council of Milan, in June 1985, of the Commission's White Paper. The other is a declaration on Article 7A of the EEC Treaty, which was adopted by the Conference of the Representatives of the Governments of the Member States that signed the Single European Act.[29] Such a declaration states that:

> "The Conference wishes by means of the provisions of Article 7A to express its firm political will to take before 1 January 1993 the decisions necessary to complete the internal market defined in those provisions, and more particularly the decisions necessary to implement the Commission's programme described in the White Paper on the Internal Market".

Therefore, if the Community was supposed to adopt the measures envisaged in the White Paper, it seems clear that it had competence to do so.[30]

In any case, at the very least, it seems that the new Article 7A reinforced the possibilities for the Community to adopt measures on third country nationals.[31] This is so because, under Articles 100 and 235, the Community may adopt measures related with the common market and its objectives. These provisions will be analysed below, but it must be emphasised at this point that the common market and the Community's objectives were extended or reinforced by Article 7A of the Single European Act. Thus, it seems easier than hitherto to justify the possibility for the Community to adopt measures on third country nationals. With the Single European Act the adoption of such measures became more pertinent for the attainment of the Community objectives.[32]

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[28] Actually, this is rather a new and more forceful legal expression of the old objective of the establishment of a common market. See the next chapter for further analysis of the relationship between the "old" "common market" concept and the concept of "internal market".

[29] Cruz sustains that this declaration means that the Conference "accepted the powers of the Community in the areas dealt with by the White Paper, including those related to third country nationals as well as asylum seekers", Cruz, A., *Community Competence over Third Country Nationals...*, op.cit., pg.4.

[30] In chapter 6, on earlier intergovernmental cooperation, this point will be retaken. An analysis will there be made on whether the competence to deal with matters related with third country nationals belongs to the Community, or to the Member States - in the framework of the intergovernmental cooperation procedure.

[31] In the next chapter it will be argued that the Community has under Article 7A the legal obligation to adopt such measures, to the extent required to establish a single internal market as defined in Article 7A.

[32] See, e.g., Mancini, G. F., "Il governo dei movimenti migratori in Europa", *Diritto del Lavoro e di Relazioni Industriali*, Year XIV, 1992, No.54, pp.233-242, at p.239.

The need for or pertinence of the adoption by the Community of measures on third country nationals may be seen from two perspectives. A first perspective only considers necessary, or important, the adoption of measures on third country nationals to the precise extent that they are required by the abolition of border controls of persons. There would be, for instance, the need for the adoption of common action on visas.[33] This narrower perspective seems to be shared by the Commission. In presenting its three draft Directives on the abolition of border controls on persons,[34] in July 1995, the Commission reaffirmed its opinion that such abolition an "constitutes a clear and unconditional obligation on the part of the Union stemming from Article 7A."[35] However, according to the Commission, the fact that the establishment of an internal market would entail for third country nationals the right to move within the territory of the Member States, would not mean that such a right to move

> "would carry with it no right of residence or work throughout the Community even for those non-Community citizens who have been granted such a right in a particular Member State."[36]

Nevertheless, it is also possible to have a less restrictive perspective on what the establishment of an internal market requires in relation to third country nationals. In this view, the existence of a true single market (e.g. in labour) would not be compatible with the different national markets, with distinct rules on the entry into and on the rights derived from the participation in such markets. This incompatibility would entail the adoption of a minimum threshold of common European measures on the right of entry to

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[33] Mattera, A. "L'achèvement du marché intérieur et ses implications sur les relations extérieures", in *Relations extérieures de la Communauté Européenne et marché intérieur: aspects juridiques et fonctionnels*, Demaret,Paul (ed.), Bruges, College of Europe, 1986/ Brussels, Story Scientia, 1988, p.201, at 217-218.

[34] The draft Directive on the elimination of controls on persons crossing internal frontiers, COM (95) 347; the draft Directive on the right of third-country nationals to travel in the Community, COM (95) 346; and the draft Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, COM (95) 348 final. All three draft Directives are dated from 12/7/1995. See chapter 4 for an analysis of these draft Directives.

[35] Idem, in the introduction to all three draft Directives. Likewise, it may be noted that these three draft Directives were presented under Article 100A, which refers to the "common market" only.

[36] "Completing the Internal Market: an Area without Internal Frontiers, Progress Report required by Article 8B of the Treaty", COM (90) 552 final, Brussels, 23 November 1990. Note, however, that the Commission seems to recognise that it is in the logic of the internal market that third country nationals resident in the Community may move from one Member State to another to work. The Commission has stated that "in spite of the establishment of an internal market without internal frontiers, third-country nationals who are permanently and legally resident in one Member State currently do not have the right to move to another Member State to engage in econnomic activity." Thus, as "a first step", the Commission planned to present in the first half of 1996 a recommendation to the Member States inviting them to give employment priority to "third country nationals permanently and legally resident in another Member State when job vacancies cannot be filled by EU nationals or nationals of third countries legally resident in the Member State concerned." See the Commission's communication on a "Medium Term Social Action Programme 1995-1997", COM (95) 134, point 3.3.5.

the single market and the rights to be enjoyed as a participant in that market.[37] It would also entail the extension to third country nationals of the rights granted to Community nationals under the rules on the free movement of workers and services.[38] Finally, it could also justify positive action favouring the integration of third country nationals in the Community society.[39]

This broader perspective could be explained by the mere establishment of a substantial version of a single market, in itself. However, it could also be sustained as a necessary and reasonable consequence of the establishment of a restrictive version of that market, in which the primarily important objective was the abolition of border controls. In fact, the dynamic that the abolition of border controls would create would justify the adoption of common rules on entry, rights of membership and the extension of full free movement to all participants in that market. The adoption of such common measures could prevent an increase in the number of third country nationals illegally working or residing in Member States, who would more easily move in a Community without internal border controls. More importantly, the adoption of such common measures could contribute to avoiding the scenario in which controls on third country nationals are merely transferred from the borders to the interior of the territories of the Member States. Until now the worst version of these controls seems to have happened in France, with systematic controls of identity (and residence status) concentrated on non-white coloured pedestrians. Naturally, at least a modest increase in the controls of third country nationals within the territory of each Member State seems inevitable. After all, this type of control existed already when border controls were in full force. However, the point is to avoid, as a corollary of the creation of the single market with no internal frontiers, the creation of a Police State within the territory of each Member State.[40] Positive and common measures on third country nationals could contribute to overcome that negative possibility.

In this context an extremely important aspect needs to be outlined. The extent to which the establishment of an internal market, as defined in Article 7A, requires the adoption of common measures on third country nationals has been discussed. In particular, the extent to which those measures should be adopted within the EC institutions or in the framework of intergovernmental cooperation between governments of the Member States

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[37] See Mattera, op.cit., loc.cit.

[38] See, e.g., O'Keeffe who sustains, that "[i]f the Community is to have an area without internal frontiers, it becomes progressively absurd that non-Community nationals established in the Community should not be afforded the protection of Community law. (...) To entrust competence in this area to the Member States at this stage of European integration only recalls and reinforces a statist view of Community Law which is inappropriate in this area." See O'Keeffe, "The Free Movement of Persons ...", *ELR*, Vol. 17, 1992, No.1, pp.3-19, at 17.

[39] As Cruz, A. sustains "The smooth functioning of a Single European market will require Community legislation against discrimination to protect all residents to avoid the creation of second or even third class citizens". See Cruz, A. op.cit., p.2. See also, for an extensive analysis of this issue, Hoogenboom, T., "Integration into Society and Free Movement of Non-EC Nationals", *EJIL*, Vol. 3, 1992, No.1, pp.36-52 and with the title "Free Movement and Integration of Non-EC Nationals and the Logic of the Internal Market", in *Free Movement of Persons in Europe...*, op.cit., pp.497-511.

[40] In a way, this would mean that the psychological and concrete barriers would move from the national frontiers to the interior of the territory of the Member States, to everywhere in which a foreigner could be controlled by the police forces.

has been discussed. However, in abstract terms, there seems to be a consensus that the adoption of some common measures on third country nationals is indispensable for the establishment of an internal market, as defined in Article 7A of the EC Treaty - whatever the appropriate forum for the adoption of such measures may be. This idea is, to some extent, shared even by the governments of the Member States, by the Communities' European Council and Council of Ministers. This is shown, for example, by the fact that when Member States' governments justify the need for intergovernmental cooperation, they often refer to the abolition of border controls and the establishment of an internal market, as defined in Article 7A. This type of reference occurs repeatedly in the statements of the European Council on intergovernmental cooperation activities. It can also be find in the declarations of the intergovernmental groups, for instance after the meetings of Ministers of the EC governments responsible for immigration matters. Another good example is the very Convention Implementing the Schengen Agreement, which includes several rules on third country nationals. In its Preamble it is stated that the Convention is agreed upon,

> "Whereas the Treaty establishing the European Communities, as amended by the Single European Act, envisages that the internal market comprises an area without internal borders,[and]
> whereas the aim pursued by the Contracting Parties coincides with that objective, without prejudice to the measures that will be adopted in pursuance of the [EC] Treaty provisions."

Consequently, it seems obvious that to establish the internal market there is a need to adopt some measures on third country nationals, even if the governments of the Member States would not agree to adopt them within the EC institutions.

Clearly, the establishment of a single internal market made more clear the pertinence of the adoption of EC measures on third country nationals for the attainment of the Community objectives.

3- The Treaty on European Union

The relationship between issues concerning third country nationals and Community objectives was, in a way, further reinforced by the very Treaty on European Union. First, this Treaty amended the old EEC Treaty provisions on Community objectives and activities, extending their scope.[41] More ambitious objectives and activities justify more easily their connection with issues concerning third country nationals. Secondly, the purpose of the provisions of Title VI of the Treaty on European Union, which envisage action in relation to third country nationals (inter alia), is the pursuit of the old Community objective of achieving free movement of persons. The adoption of common measures with respect to third country nationals is clearly seen as a requirement of such freedom of movement. According to Article K.1 TEU, the cooperation on Justice and Home Affairs will be undertaken:

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[41] Cf. supra the footnotes on the original version of Articles 2 and 3. Those footnotes recall the present version of those provisions, as amended by the Treaty on European Union.

> "For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community."[42]

In turn, Article B of the TEU, when defining Union objectives, does not refer explicitly to the free movement of persons. It only mentions "the creation of an area without internal frontiers", while seeking:

> "to maintain in full the acquis communautaire and to build on it with the view to consider, through the [revision of the Treaties] (...) to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community."

It thus seems that, as far as free movement of persons is concerned, the Union does not have different objectives from those of the Community.

Therefore, in legal terms, it may be argued that Community objectives, as far as third country nationals are concerned, were reinforced, or at least stressed by the Treaty on European Union.[43]

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[42] See also Article M and, to a certain extent, even Article B, as far as the respect for the acquis communautaire is concerned. See also Article 134 of the Convention Applying the Schengen Agreement, with a similar rule: "The provisions of this Convention shall apply only in so far as they are compatible with Community Law".

[43] See chapter 7, where it will be argued that, in strict legal terms, Title VI of the Treaty on European Union introduced an alternative institutional framework to deal with issues concerning third country nationals, without as such diminishing Community powers in this area.

C) THE SUBSIDIARITY PRINCIPLE AND THE JUSTIFICATION OF EC MEASURES ON THIRD COUNTRY NATIONALS

The subsidiarity principle[44] was formally introduced in general terms in Community Law by the Treaty on European Union, which included in the EC Treaty a new Article 3B, providing that:

> "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the

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[44] There is an extensive literature on the principle of subsidiarity in the European Community. See, e.g., Burgess, Michael "Federalism, Subsidiarity and the European Union", in *The European Union at the Crossroads - Problems in Implementing the Single Market Project*, Cox, Andrew & Furlong, Paul (eds.), Boston - Lincolnshire, Earlsgate Press, 1995, p.1; Cass, Deborah Z., "The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community", *CMLRev*, Vol. 29, 1992, No.6, pp.1107-1136; Constantinesco, V., "Article 3B", in *Traité de Maastricht sur L'Union Européenne*, Constantinesco, Vlad , Kovar, Robert & Simon, Denys (eds.), Paris, Economica, 1995; pp.107-118; Dehousse, R., *Does subsidiarity really matter?*, E.U.I. Working Paper 92/32; Emiliou, Nicholas, "Subsidiarity: An Effective Barrier Against 'the Enterprises of Ambition?' ", *ELR*, Vol.17, 1992, No.5, pp. 383-407; Emiliou, N., "Subsidiarity : Panacea or Fig Leaf ?", in *Legal Issues of the Maastricht Treaty*, O'Keeffe, David & Twomey, Patrick (eds.), London, Chancery, 1994, pp.65-83; Jacqué, J.P., "Rapport Communautaire", *Le Principe de Subsidiarité*, XVI FIDE Congress, Rome, 1994, pp.13-38; Koopmans, T. "The Quest for Subsidiarity", in *Institutional Dynamics of European Integration*, Vol.II, by Curtin, D. & Heuklels, T.(ed.), Dordrecht, Martinus Nijhoff, 1994, pp.43-55; Lenaerts, K. & van Ypersele, P., "Le principe de subsidiarité et son contexte: étude de l'article 3 B du Traité CE", *CDE*, Vol.30, 1994, No.1-2, pp.3-85; Marquardt, Paul D., "Subsidiarity and Sovereignty in the European Union", *Fordham International Law Journal*, Vol.18, 1994, No.2, pp.616-640; Neunreither, K., "Subsidiarity as a Guiding Principle for European Community Activities", in *Government and Opposition* , Vol.28, No.2, pp.206-220; Palacio González, José "The Principle of Subsidiarity (A guide for lawyers with a particular community orientation)", *ELR*, Vol. 20, 1995, No.4, p. 355-370; Philip, C. & Boutayeb, C. "Subsidiarité (Principe de -)", in *Dictionnaire Juridique des Communautés Européennes*, Barav, Ami & Philip, Christian (eds.), Paris, P.U.F., 1993, pp.1023-1035; Steiner, J., "Subsidiarity under the Maastricht Treaty", in *Legal Issues of the Maastricht Treaty*, op.cit., pp.49-64; Toth, A. G. "The principle of subsidiarity in the Maastricht Treaty", *CMLRev*, Vol. 29, 1992, No.6, pp.1079-1105; Toth, A.G., "A Legal Analysis of Subsidiarity", in *Legal Issues of the Maastricht Treaty*, op.cit., pp.37-48; Toth, A.G., "Is Subsidiarity Justiciable ?", *ELR*, Vol.19, 1994, No.3, pp.268-285; Van Kerbergen, K. & Verbek, B. "The Politics of Subsidiarity in the European Union", *JCMS*, Vol.32, 1994, No.2, pp.215-236; and Weatherill & Beaumont, op.cit., pp.779-782. See also, in a more general perspective on division of powers between the Community and Member States: Fischer, Thomas C., " 'Federalism' in the European Community and the United States: A Rose by Any Other Name", *Fordham International Law Journal*, Vol.17, 1994, No.2, pp.389-440; Lenaerts, K., "Some Reflections on the Separation of Powers in the European Community", in *CMLRev*, Vol.28, 1991, No.1, pp.11-35; Moravcsik, A., "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach", in *JCMS*, Vol.31, 1993, pp.473-524; Pollack, M. A. "Creeping Competence: The Expanding Agenda of the European Community", *Journal of Public Policy*, Vol.14, 1994, No.2, pp.95-145; and Weatherill, S., "Beyond Preemption ? Shared Competence and Constitutional Change in the European Community", in *Legal Issues of the Maastricht Treaty*, op.cit., pp.13-31.

> Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

While the first paragraph of this provision confirms the *principe d'attribution des compétences*, and the third paragraph formalises the proportionality principle, it is the second paragraph that refers to the "principle of subsidiarity".

The subsidiarity principle has deep historical roots,[45] and is not exactly new within the Community legal order.[46] It is also subject to various understandings. In any case, its basic idea is that power should be allocated so as to favour local control except where broader common interests predominate.[47] A larger unit shall only assume functions "insofar as the smaller units of which it is composed are unable or less qualified to fulfil their role."[48]

It is out of the scope of this chapter, as well as of this thesis, to analyse in depth the subsidiarity principle. Here what is important is to determine whether the subsidiarity principle, as introduced by the Treaty on European Union, brought significant changes to the existing EC Treaty regime on Community competence to act on third country nationals. Does it make any fundamental difference for the possibility that the Community adopt measures on third country nationals?

To start with, some general remarks can be made.

The first is the following. It is undoubtedly true that the intention behind the inscription of the subsidiarity principle in the EC Treaty was to limit Community action and emphasise the general competence of Member States.[49] However, it has also been argued that the reasoning underlying the subsidiarity principle actually reinforces the justification for the adoption of Community action, since it calls for a general functional justification of Community and Member States actions.[50]

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[45] See, generally, Millon-Delsol, *L'État subsidiaire, Ingérence et non-ingérence de l'État: le principe de subsidiarité aux fondements de l'histoire européenne*, Paris, PUF, 1992. In one way or another the idea of subsidiarity was used by Aristotle, Thomas Aquinas, Proudhon, Tocqueville. See also the 1931 encyclical Quadragesimo Anno, of Pope Pius XI, and Article 72 of the German Grundgesetz (the German Basic Law).

[46] See, e.g., Article 130R(4), introduced by the Single European Act in the EEC Treaty, providing that "The Community shall take action relating to the environment to the extent to which the objectives [of preserving, protecting and improving the quality of environment; contributing towards protection of human health; and ensuring a prudent and rational utilisation of natural resources] can be attained better at Community level than at the level of the individual Member States. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures." See also Article 12(2) of the Parliament's "Draft Treaty Establishing the European Union" of 1984, quoted supra. See, generally, Cass, op.cit., pp.1110-1128.

[47] Marquardt, op.cit., p.618.

[48] Neunreither, op.cit., p.207.

[49] See Constantinesco, op.cit., p.11, and Jacqué, op.cit., p.38.

[50] See Marquardt, who states that: '[s]ubsidiarity reduces the question of sovereignty to one of efficiency. Without the emotional and historical appeal of the classical vision of sovereignty, the state is reduced to a functional justification. (...) In the long run, nation-states forced to fight on subsidiarity's field of functional efficiency must lose power.' See Marquardt, op.cit., p.636-7. See also Steiner, op.cit., p.52.

Secondly, the subsidiarity principle is relevant for the Community competence to act on third country nationals since, as explained before, there is no exclusive EC competence to act in this field.[51] As will be explained below, the Community may act on issues concerning third country nationals mainly under Articles 100 and 235 of the EC Treaty. These provisions grant the Community a potential competence, which, by its own nature is a concurrent or shared competence. It is to Community action under this type of competence that the subsidiarity principle applies.

Thirdly, it may be recalled that the subsidiarity principle does not confer or withdraw Community competences. It just allocates the exercise of competences that have already been created by other Treaty provisions.[52]

However, what about the competences' exercise? Does the subsidiarity principle established in Article 3B introduces significant new limits on the exercise of Community competences to act on third country nationals?

In my view that is not the case. It is submitted that the formal inclusion of the subsidiarity principle in the EC Treaty, through the new Article 3B, did not exclude or substantially reduce the possibilities for the EC to act on issues concerning third country nationals.

A first important point to draw this conclusion relates to Articles 100 and 235 of the EC Treaty, which are still in force after the Treaty on European Union. Below, in this chapter, it will be seen that these are the main EC Treaty provisions under which the Community may act on issues concerning third country nationals. Article 100 provides that the Council, acting by unanimity, may

> "issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market".

Under Article 235, also by unanimity, the Council may take "appropriate measures", in case that

> "action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and [the EC] Treaty has not provided the necessary powers".

The point here is that, arguably, the conditions for Community action to be taken under these two provisions are equivalent to those of the subsidiarity principle.[53] Article 100 refers to approximation of rules that "directly affect the establishment or functioning of the common market". Article 235 refers to Community action that proves "necessary to attain, in the course of the operation of the common market, one of the objectives of the Community". In Article 100 the need for common action is implicitly required in the

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[51] Unless the legal status of third country nationals comes under the domain of areas in relation to which the Community has exclusive competence.

[52] Philip & Boutayeb, op.cit., p.1026 and Toth, *ELR* , op.cit., p.269.

[53] See also Philip & Boutayeb, op.cit., (who consider that these provisions contain implicitly the subsidiarity principle) and Steiner, op.cit., p.50. Against, Toth argues that the subsidiarity principle cannot apply to Community action taken under Articles 100 and 235. See Toth, *CMLRev*, p.1082. I do not agree with Toth but his position has the advantage of reinforcing my view that the inclusion of the new Article 3B in the EC Treaty did not reduce the possibilities for the EC to act on issues concerning third country nationals.

demanded relation to the "establishment or functioning of the common market". In Article 235 the need for common action is both required explicitly ("should prove necessary to...") and implicitly ("in the course of the operation of the common market"). Therefore, it can be said that these two provisions contain a sort of practical application of the subsidiarity principle.

The required conditions for their use are at least equivalent to those required by the subsidiarity principle. In practical and legal terms it does make sense to adopt EC action under those Articles "only if and in so far as the objectives of the proposed action" can "be better achieved by the Community", "by reason of the scale or effects of the proposed action". At most the subsidiarity principle reinforces the requirement that any Community action, and thus also Community action on third country nationals, be really necessary and "cannot be sufficiently achieved by the Member States". The proportionality principle reinforces further this idea as far as the extension of the Community action is concerned.[54] In any case neither the subsidiarity principle, nor the proportionality principle challenge in basic terms the possibility for the Community to act on third country nationals.

This does not mean that the present author underestimates the repercussions of the subsidiarity principle. Such repercussions are valid for an eventual Community action on third country nationals, as well as for action in other fields. Any EC action has to fulfil the requirements of Article 3B, and notably of its second paragraph. All I want to emphasise here is that the subsidiarity principle does not exclude or substantially reduce (in view of the previously existing legal regime) the possibilities for the EC to act on issues concerning third country nationals.

On the other hand, it could even be said that, under Articles 100 and 235, the conditions for adoption of EC measures are actually more stringent than those established by the subsidiarity principle, since those provisions require explicitly a relation of the EC action to the 'establishment', 'functioning', or 'operation' of the common market".

Furthermore, the subsidiarity principle as included in Article 3B of the EC Treaty does not exclude the wide margin of discretion enjoyed by the EC institutions (e.g. under Articles 100 and 235) to decide whether it is necessary to adopt an EC measure.[55]

Thus, it does not seem that the subsidiarity principle substantially reduces the possibilities for the EC to act on issues concerning third country nationals.

There is another important factor pointing in that direction. It relates to the fact that the subsidiarity principle applies not only to the Community activities, but also to those of the European Union in general. According to the last paragraph of Article B of Title I, on Common Provisions, of the Treaty on European Union,

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[54] This is, to a certain extent, an aspect already included in the subsidiarity principle itself, as inscribed in the second paragraph of Article 3B - "if and in so far as" - seen in conjunction with the EC Treaty provisions that define the Community objectives, notably Articles 2 and 3 of the EC Treaty.

[55] This has been pointed out by several authors, who, likewise highlight the political dangers of a strict judicial enforcement of the subsidiarity principle. See, for the both aspects: Constantinesco, op.cit, pp.112-4; Emiliou, N., "Subsidiarity : Panacea or Fig Leaf ?", op.cit., p.78; Lenaerts & van Ypersele, op.cit., pp.77-8; Palacio González, op.cit., pp.366-8, Toth, *ELR*, op.cit, and Weatherill & Beaumont, op.cit., p.782. See also Cass, op.cit., p.1130.

> "The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3B of the Treaty establishing the European Community".

Therefore, the subsidiarity principle applies also to action taken under Title VI of the Treaty on European Union, on "Cooperation in the fields of Justice and Home Affairs". This is further confirmed by Article K.3(2)(b) of that Title, which provides that the Council may

> "adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged".

The fact that the subsidiarity principle is equally applicable to the Community pillar, and to the third pillar seems to be of a fundamental importance. Some of the most fundamental activities planned of Title VI relate precisely to third country nationals: to 'immigration policy and policy regarding nationals of third countries', to 'asylum policy' and to 'rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon'.[56] There seems to be no reason to believe that an action may be justified under the subsidiarity principle if adopted under Title VI of the Treaty on European Union, but not if adopted under the Community framework. The explicit reference in Article B of the Treaty on European Union to the new Article 3B shows unequivocal that we are talking here of the very same principle. Therefore, it seems clear that the subsidiarity principle, as such, is not an obstacle for the Community to adopt any type of measure, whatsoever, which may be adopted under Title VI of the Treaty on European Union.

What conditions the adoption of EC measures that can be adopted within the third pillar is not the subsidiarity principle, since it applies to both pillars. What conditions the adoption of EC measures on third country nationals are, first, the requirements laid down in Articles 100 and 235 and, secondly, the Community objectives. The objectives of Title VI of the Treaty on European Union may eventually be seen as being broader than those of the European Community. However, to most extent the first pillar (Community) and the third pillar (Title VI of the Treaty on European Union) have common objectives.[57] This is particularly clear as far as free movement of persons is concerned. Insofar as Title VI of the Treaty on European Union and the EC Treaty have the same objectives, any measure that can be adopted under the framework of Title VI, can also be adopted under the Community framework - provided the conditions of Articles 100 and 235 are fulfilled. The subsidiarity principle makes no difference in this respect, since in both frameworks it has to be respected in the same manner. Again, it seems clear that the formal inclusion of the subsidiarity principle in the EC Treaty, in the new Article 3B, did not diminish the possibilities for the EC action on issues concerning third country nationals. It could even be argued that by establishing that the third pillar has to respect the subsidiarity principle, while explicitly envisaging that it will act on third country nationals, the Treaty on

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[56] See Article K.1 of the Treaty on European Union.

[57] Compare Articles B and Article K.1 of the Treaty on European Union, with Articles 2 and 3 of the EC Treaty. See also, supra in this chapter, point 3 of section B, and, below in chapter 7, my remarks on the relation between Title VI and Community Law.

European Union actually stresses the need for common action on them. In this respect, it may reinforce the justification for adoption of Community measures on third country nationals.

This permits to emphasise another important point.[58] The need for common action on third country nationals may be separated from the precise framework in which that action will be adopted and carried out.

Articles 100 and 235 of the EC Treaty, and the subsidiarity principle in general terms, stress the need for a common action as a fundamental condition for Community action to be adopted. But the need for common action on third country nationals is beyond doubt in most of the issues concerning them. The fact that intergovernmental cooperation (both on an ad hoc basis and under Title VI of the Treaty on European Union) acts on issues related to third country nationals is evidence that common action on them is necessary.[59] Clearly, the "objectives of the proposed action cannot be sufficiently achieved by the Member States".

This may be of interest for the following reason. In my view, the subsidiarity principle, as established in Article 3B of the EC Treaty, does only consider two hypotheses: either action is better taken by individual Member States, or by the Community. The implicit principle is that action is better taken by Member States.[60] In case that is not so, then action should be taken by the Community. In itself, the subsidiarity principle established in Article 3B of the EC Treaty, does not consider a third possibility, i.e. that action may not be adequately taken by Member States, but that it may be satisfactorily taken within an intergovernmental cooperation framework.[61] Thus, to this extent, it may be argued that it reinforces the possibility that the Community takes action on third country nationals when such action cannot be adequately taken by individual Member States.

In any case, what seems to be certain is that the subsidiarity principle, included in the new Article 3B of the EC Treaty, did not substantially reduce the possibilities for the Community to act on issues concerning third country nationals.

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[58] To some extent this is just another aspect of the point made before - on the repercussions of the application of the subsidiarity principle in both the Community and in Title VI of the Treaty on European Union.

[59] See supra, section B, point 2.b).

[60] In areas which are not of the Community exclusive competence.

[61] In favour (in general terms and not referring specifically to issues concerning third country nationals), see Lenaerts & van Ypersele, op.cit., pp.46-7; and (apparently) Toth, *CMLRev*, op.cit., pp.1098-9.

D) EC TREATY PROVISIONS FOR ADOPTION OF MEASURES OF NARROW SCOPE

1 - General

It seems clear that issues concerning third country nationals may be closely related to the general objectives and activities of the Community. Furthermore, the subsidiarity principle, as established in Article 3B of the EC Treaty does not seem to preclude the existence of Community competences with respect to third country nationals. However, under which provisions of the EC Treaty could specific[62] measures on third country nationals be adopted?

Article 101 is one of the provisions under which measures relating to third country nationals could be taken.[63] This Article envisages the adoption of Directives when:

> "a difference between the provisions laid down by law, regulation or administrative action in the Member States is distorting the conditions of competition of the common market and (...) the resulting distortion needs to be eliminated(...)"

This provision could be the basis for the adoption of Directives concerning third country nationals, e.g., insofar as different national rules on access to the labour market and their rights and duties as workers may distort competition in the common labour market. It is noteworthy that, after the end of the first stage, for Directives to be adopted under this Article only a qualified majority is required.

On the other hand, it is clear that measures relating to third country nationals cannot be adopted on the basis of Article 113, which provides for the establishment of a common commercial policy. Clearly, trade relates to goods not to persons. It may be difficult for a comprehensive common external policy to avoid dealing with issues related with immigrants from third countries, but these issues certainly cannot be included under the Community competence in external trade. However, for the purposes of this chapter there are some interesting aspects of the competence of the Communities in external and internal trade that are worthy of being mentioned here. First, as Evans recalls, under the ECSC Treaty there was no provision for a common customs tariff or for a common commercial policy. However, very early on the Commission argued and the Court accepted[64] the principle that the Community guaranteed free movement for coal and steel products, not only when they originated in Member States, but also when they came from third countries - provided they had been properly admitted to one Member State.[65] Secondly, it may also be noted that Article 95 of the EC Treaty, which prohibits discriminatory taxation on products only refers to "products of other Member States". However, the Court of Justice held that such provision is also applicable to products

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[62] It is again recalled that I am interested here in measures exclusively or primarily related to third country nationals. I am not referring to measures which, even if applicable to third country nationals, were not adopted having them as an exclusive or primary concern.

[63] See also Article 102 of the Treaty of Rome.

[64] See joined cases 9 and 12/60, Société Commerciale Antoine Vloeberghs, S.A. v. High Authority of the ECSC [1961] ECR 197, at 215-217.

[65] See Evans, Andrew, "Third Country Nationals and the Treaty on European Union", *EJIL*, Vol. 5, 1994, No.2, p.199.

originating in third countries that are in free circulation in the Community.[66] That ruling was based on the fact that commercial policy with regard to third countries falls within the exclusive competence of the Community.[67] That is certainly not the case for issues related to immigration and immigrants from third countries. However, that seems to be the case as far as the free movement of persons is concerned, and ,arguably, as regards the establishment of a common labour market in the context of the creation of a single internal market.

Certainly, persons are not goods. Therefore the reasoning applied to the relation between external and internal movement of goods cannot be automatically applied to persons. Yet, the solutions found in the matters to which reference has been made still remain interesting examples of how the Treaty rules can be used going beyond a restrictive interpretation.

In the field of Social Policy there are some Treaty provisions which could justify the adoption of measures relating to third country nationals. In Article 117 there is a general reference to the fact that :

> "Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained"

The same provision adds that Member States :

> "(...) believe that such a development will ensue (...) also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action."

Clearly, this provision does not confer any powers on the Community, it simply expresses the common concerns of the Member States. At most, it has, in relation to its chapter, an equivalent significance to that of Article 2 for the whole Treaty. Meanwhile, the existence of those common concerns can result in the adoption of legal instruments, but such adoption can only be done under powers granted by other provisions of the Treaty of Rome.

One instrument used in the social field is the European Social Fund, whose Treaty rules are also relevant for the Community competence in relation to third country nationals. According to Article 123, that Fund is established

The task of the Fund is that of

> "rendering the employment of workers easier and of increasing their geographical and occupational mobility within the Community, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining."[68]

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[66] See case 193/85, Cooperativa Co-Frutta v. Amministrazione delle Finanze dello Stato [1987] ECR 2085, at 2112-2114.

[67] Idem, paragraph 28 of the judgment.

[68] Emphasis added. This is the version as amended by the Treaty on European Union. The previous version referred to the common market and not to the internal market, and did not mention the objective of facilitating the workers' "adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining".

The generic references of the Article explain why the European Social Fund has financed programmes promoting the integration of immigrants from third countries and even the training of social workers and teachers involved with third country nationals.[69]

2 - Article 118 and case Germany et al v. Commission[70]

Another interesting instrument in the social field is Article 118, which reads as follows:

> "Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to: employment; labour law and working conditions; basic and advanced vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene; the right of association, and collective bargaining between employers and workers.
> To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations.
> Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee."

During the late seventies and the first half of the eighties the issues relating to immigrants from third countries were discussed on several occasions by the Community institutions. The Commission has proposed to initiate consultations on Member States' migration policies concerning third countries and the Council, on several occasions recognised the need for such consultation.[71]

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[69] See Jacobs, A. T. J. M. & Zeijen, H. in *European Labour Law and Social Policy*, Tilburg, Tilburg University Press, 1993, at p.44. See also chapter 4, section C.

[70] Joined cases 281, 283 to 285 & 287/85, Germany, Netherlands, France, United Kingdom & Denmark v. Commission [1987] ECR 3203. On this case see Constantinesco,Vlad & Simon, Denys, *JDI*, Year 115, 1988, No.2, pp.493-494; Decaux, Emanuel "Sommaire et Note au Arrêt du 9 Juillet 1987 - Allemagne, France, Pays-Bas, Danemark, Royaume-Uni c. Commission (aff. jtes. 281, 283, 284, 285 et 287/85)", *RTDE*, Vol.23, Dec. 1987, No.4, pp.707-716; Desolre, Guy , "Compétence en matière de politique migratoire vis-à-vis des États tiers - Cour de Justice, 9 Juillet 1987, (affaires 281,283,284,285 et 287/85, Allemagne et Autres c. Commission)", *CDE*, Vol.26, 1990, No.3-4, pp.53-464; Hartley, Trevor "The Commission as Legislator under the EEC Treaty", *ELR*, Vol.13, April 1988, No.2, pp.122-125; Mancini, G. F., "Politica comunitaria e nazionale delle migrazioni nella prospettiva dell'europa sociale", *Rivista di Diritto Europeo*, Vol.29, 1989, No..3-4, pp.309-319 and "Il governo dei movimenti migratori in Europa", op.cit., pp.233-242; O'Keeffe, D., annotation to the case in *International Labour Law Reports*, Vol.7, 1986-87, pp.338-347, at 346-347; Simmonds, Kenneth R. "The Concertation of Community Migration Policy"; *CMLRev*, Vol.25, 1988, No.1, pp.177-200; Travesa, Enrico "Il coordinamento delle politiche migratorie nazionali nel confronti degli stranieri extracomunitari. Prospettive aperte dalla sentenza della Corte di Giustizia delle Comunità Europee 9 Luglio 1987", *Rivista di Diritto Europeo*, Vol.28, 1988, No.1, pp.5-22 and Vilà Costa, Blanca, annotation to the case in *Revista Jurídica de Catalunya*, 1988, pp. 516-520.

[71] On 21 January 1974, the Council adopted a resolution concerning a Social Action Programme, in which it recognised that the migration policies pursued by Member States affected the Community's social policy and considered necessary and expressed its resolve to promote consultation between the Member States on immigration policies vis-à-vis third countries, see OJ C 13/1 of 1974. In December 1974, the

a) the Commission's Resolution

Attempting to make progress in this respect, on 8 July 1985, the Commission adopted under Article 118 a "decision setting up a prior communication and consultation procedure on migration policies in relation to non-member countries".[72] According to its

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European Council stressed the need for progressive harmonisation of legislation affecting aliens (point 10 of the final communiqué of the Conference). In February 1976, the Council approved a resolution based on the proposal of the Commission for an Action Programme for Migrant Workers, in which it was considered important to undertake appropriate consultation on migrant policy vis-à-vis third countries - Resolution of the Council of 9 February, OJ 1976 C 34/2 of 14/2/1976 and Bull. EC, Suppl. 3/76. In November 1979 the Council stated that the aim of the consultation on migration policies vis-à-vis non-member countries would be not to facilitate the adoption of the Community legal instruments but rather to attain "a common attitude of the Member States", without prejudice to the powers of the institutions of the Community. The Council also asked the Commission to prepare or organise such consultations. See the conclusions of the Council meeting of 22 November 1979, in Bull. EC 11-1979, p.45, point 2.1.43. See also Doc. PV/CONS 53 SOC 292 of 26/11/1979. In June 1980, the Council Resolution on Guide Lines for a Community Labour Market Policy stated that market integration "should be fostered within the framework of free movement of labour (...) taking account of the employment priority to be offered to workers who are nationals of a Member State and of the need to contain access to the Community labour market by labour from third countries, and by appropriate consultation on migration policies vis-à-vis third countries(...)"; OJ C 168/1 of 1980. This document ends by stating that the Commission should take the initiatives necessary to promote cooperation between Member States in the field of labour-market policy. On 22 June 1984, the Council, in its conclusions concerning a Community Medium Term Social Action Programme (OJ C 175/1, of 4/7/1984), noted that the Commission would submit proposals to the Council for: "developing cooperation between Member States on the control of migratory flows from third countries". The situation soon developed further, especially after the Communication from the Commission to the Council on Guidelines for a Community Policy on Migration, of 1 March 1985, COM (85) 48 final. In its point 41 the Commission expresses its intention to provide an appropriate framework for "a process of information and consultation" on "migration policies with regard to third countries". In an annex, the communication included a Draft EEC Council Resolution on the matter. It considered it to be "necessary to have much closer consultation and co-operation at Community level in the implementation of national migration policies vis-à-vis third countries". However, the response of the Council to the Commission proposal was a very laconic one. In July 1985, the Council issued a Resolution on Guidelines for a Community policy on migration - Council Resolution 85/C, 186/04, OJ C 186/3, of 26/7/1985. In its Preamble it mentioned that: "much closer consultation and cooperation is required at Community level in the implementation of national migration policies vis-à-vis third countries(...) however, matters relating to the access, residence and employment of migrant workers from third countries fall under the jurisdiction of the governments of the Member States, without prejudice to Community agreements concluded with third countries". In the main text of the Resolution, the Council recognised "that it is desirable to promote cooperation and consultation between the Member States and the Commission as regards migration policy, including vis-à-vis third countries, and notes the Commission's intention of drawing up an appropriate procedure to this end". Finally, the Council invited the Commission to take the necessary initiatives and present the necessary proposals to the Council itself "to put into effect the measures referred to in this resolution". It was as a result of this Council Resolution that the Commission adopted the decision mentioned in the following footnote.

[72] Commission Decision 85/381/EEC setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, OJ L 217/25, of 14/8/85. The Commission's resolution was approved on 8 July but only published in 14 August. The Council Resolution on Guidelines for a Community policy on migration (the immediate precedent to the Commission resolution) was approved on 13 June 1985, formally adopted at its meeting of 16 July and published in 26 July.

Article 1, the Member States were to inform each other, and the Commission, of draft measures and agreements related

> "to third country workers and members of their families, in the areas of entry, residence and employment [including illegal], (...) as well as the realisation of equality of treatment in living and working conditions, wages and economic rights, the promotion of integration into the work force, society and cultural life, and the voluntary return of such persons to their countries of origin".

The objectives of the consultation were defined in Article 3:

> - to facilitate the mutual exchange of information and the identification of problems of common interest and the adoption of a common position by the Member States, particularly as regards international instruments relating to migration;
> - to ensure that the referred agreement and measures are in conformity with and do not compromise the results of Community policies and actions in these fields, in particular in relation to the Community labour market policy, and
> - to examine the possibility of measures (to be taken by the Community or Member States) aimed at achieving progress towards a harmonisation of national legislation on foreigners, promoting the inclusion of a maximum of common provisions in bilateral agreements, and improving the protection of Community nationals working and living in third countries.

Articles 2 and 4 defined the procedure to be adopted in the consultation. The latter could be initiated by a Member State or by the Commission itself and would be arranged by the latter. Meetings would be chaired by the Commission too, which would also provide the secretariat.

However, not all Member States were satisfied with this Commission decision. The governments of Denmark, France, Germany, Netherlands and the United Kingdom asked the Court of Justice to declare the decision void.[73] The main arguments of such governments against the decision were related to the Commission's competence in adopting it.[74] According to those Member States, neither Article 118 nor any other provision of the EEC Treaty could empower the Commission to adopt a binding decision. Moreover, they also contended that the field of the decision falls (entirely or at least partly) within the exclusive jurisdiction of the Member States.

b) the Court's Ruling

The Court ruled on the case in July 1987, two years after the adoption of the Commission decision. The Court declared the decision void on two points, giving only partial satisfaction to the governments of the Member States.

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[73] The application of the Netherlands was declared inadmissible because it was presented too late.

[74] Member States also submitted that the Commission would have infringed an essential procedural requirement because it did not consult the Economic and Social Committee. Furthermore it would lack a proper statement of reasons since it did refer to the Council resolution of 16 July 1985, which had no binding effect. Advocate General Mancini argued that the lack of consultation of the Economic and Social Committee was a valid reason to annul the Commission's decision. The Court of Justice considered that the Commission did not need to consult the Economic and Social Committee because its decision was not a proposal for the implementation of practical measures, but only a "purely preparatory and procedural" instrument. The Court also ruled that the reference to Article 118 was sufficient as the legal basis of the decision.

In relation to their first argument the Court ruled that Article 118 in fact empowered the Commission to adopt a binding decision on the Member States establishing a communication and consultation procedure. The Court considered that as Article 118

> "confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and *per se* the powers which are indispensable in order to carry out that task."

Therefore,

> "the second paragraph of Article 118 must be interpreted as conferring on the Commission all the powers which are necessary in order to arrange the consultations (...) [e.g.] to require the Member States to notify essential information (...) [and] to require them to take part in consultations. "[75]

However, the Court considered that the Commission had exceeded the scope of its powers under Article 118, in so far as the decision :

> "lays down a precise obligation on the Member States and is intended to debar them from adopting national measures or concluding agreements that the Commission considers not to be in conformity with Community policies and actions"[76].

The Court outlined that :

> "the Commission has a power of a purely procedural nature to initiate a consultation procedure [and] it cannot determine the result to be achieved in that consultation and(...)prevent the Member States from implementing drafts, agreements and measures which it might consider not to be in conformity with Community policies and actions."[77]

However, the most interesting point for the purposes of this chapter is the question of whether the fields referred to in the Commission's decision were covered by the social field mentioned in Article 118.

Firstly, the Court had to assess whether migration policy falls completely outside the social field referred to in Article 118. The Court held that:

> "(...) the employment situation and, more generally, the improvement of living and working conditions within the Community are liable to be affected by the policy pursued by the Member States with regard to workers from non-member countries"[78]

In this respect the Court recalled the repeated explicit statements of the Council in the same context. Consequently, the conclusion of the Court was that

> "the argument that migration policy in relation to non-member States falls entirely outside of the social field, in respect of which Article 118 provides for cooperation between the Member States, cannot be accepted".

The Court also ruled out the argument of the French government that all policy on foreign nationals falls outside the social field because it involves questions of public security in which the Member States have exclusive competence. The Court considered that

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[75] Paragraph 28 of the decision of the Court.
[76] Paragraph 35 of the decision of the Court.
[77] Idem, paragraph 34.
[78] Ibidem, paragraph 16.

> "(...)pursuant to their rules governing foreign nationals Member States may take measures with regard to workers who are nationals of non-member countries (...) which are based on considerations of public policy, public security or public health and which are, as such, their own responsibility(...)".

However, the Court concluded that

> "(...)this does not mean that the whole field of migration policy in relation to non-member countries falls necessarily within the scope of public security."[79]

The Court also examined whether part of the matters included in the Commission's decision could fall outside the social field according to the meaning of Article 118. One of the objections of the Member States was that the decision could not introduce a consultation procedure into the cultural field. Actually, the decision referred to the "promotion of integration into the work force, society and cultural life" of migrant workers from third countries and members of their families. The Court considered the following reference to be legitimate: the reference to "the promotion of the integration into the work force of workers from non-member countries(...) in so far as it is closely linked to employment". Integration of those workers into society was held to be equally covered by the social field of Article 118, "inasmuch as the draft measures in question are those connected with problems relating to employment and working conditions".[80]

However, the Court ruled that the cultural integration of immigrant communities from non-member countries cannot be included in the social field according to the meaning of Article 118. The Court said that:

> "(...) whilst this may be linked, to an extent, with the effects of migration policy, it is aimed at immigrant communities in general without distinction between migrant workers and other foreigners".

Moreover, in the Court's view, cultural integration only has an "extremely tenuous" link with problems relating to "employment and working conditions".

The final conclusion of the Court was that the Commission's decision was void to the extent that the envisaged information and consultation procedure covered matters relating to the cultural integration of workers from third countries,[81] and to the extent that one of the objectives of the consultation was to ensure that the draft national measures and agreements were in conformity with Community policies and actions.

c) Comments on the Court's Ruling

The ruling of the Court in this case may be analysed from two perspectives: from a legal perspective and from a more general perspective - the latter also taking into account political considerations and the functioning of the institutional system of the EC.

From a legal perspective, the ruling of the Court was important because migration from third countries was recognised as having a place within the activities of the Community and, moreover, the powers of the Commission to promote cooperation between Member States were consolidated. It is very important that the Court rejected the

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[79] Ibidem, paragraph 25.

[80] Ibidem, paragraph 21.

[81] This ruling could be questioned nowadays, since the new Article 128 of the EC Treaty, as amended by the Treaty on European Union, provides for certain Community competences in the cultural field. Article 128(4), for example, provides that: "The Community shall take cultural aspects into account in its action under other provisions of this Treaty".

view that the whole area of policy on foreign nationals falls outside the social field mentioned in Article 118, and therefore of Community Law.

The judgment of the Court in this crucial aspect (as in others) was very much influenced by the Opinion of its Advocate General Mancini. He explained at length the relevance of national migration policies for the Community, as well as the importance attached by several resolutions of the Council to concertation on those policies.[82]

The Court recognised that immigration from third countries is relevant for EEC activities and that it may be the object of a cooperation procedure within its institutions. It was the first time that such recognition occurred. This was very important in symbolic terms, given the traditional reluctance of the Member States to accept even the mere discussion of these matters at a Community level. Some authors even consider that the Court's ruling opened the way for the adoption by the Council of legislation on entry and residence of third country nationals, in the framework of a future Community policy on migration from third countries.[83]

In any case, compared to the Court's acceptance of the claim that immigration from third countries was related to the EC social field, the rejection of the inclusion of cultural integration in the cooperation procedure seems clearly to be of secondary importance.[84]

As far as the powers of the Commission are concerned, the Court settled clearly in favour of the Commission the old discussion on what it could do under Article 118.[85] Yet, the powers of the Commission, although strengthened, remained only procedural. Furthermore, the Court did set limits to the Commission's powers. It ruled that the Commission could not define as one of the objectives of the consultation the objective to ensure that national agreements and measures be in conformity with, and do not compromise the results of, Community policies and actions. In this respect the ruling of the Court seems to be particularly open to criticism.[86] First, it appears positive to aim at a

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[82] As Mancini put it: "[o]n six occasions the Council stated that consultation is indispensable; twice it spurred the Commission on to implement it and, when the Commission decided to act, asked it on a further two occasions to inform the Council of its proposals." See ECR, case quoted, at p.3227, point 7 of the Advocate General's opinion. In general terms, compare the conclusions of the Court in paragraphs 16 to 21 of its judgment and Mancini's opinion in its points 5 to 7 (pp.3224-8) and points 14-15, in the part at pp.3238-9.

[83] See Mancini, "Il governo dei movimenti migratori ...", op. cit., at p.237 and Travesa, op.cit., pg.14.

[84] See also, e.g., Travesa, op.cit., p.13, who states that: "[p]ur non sottovalutando l'importanza delle misure d'integrazione culturale (...) dei cittadini dei paesi terzi, non si può non rilevare che, rispetto al numero e all'importanza delle materie elencate dall'articolo 1 della decisione (...) l'annullamento parziale in questione deve considerarsi di portata alquanto modesta."

[85] It is generally regarded that in so doing the Court used the doctrine of implied powers. See Hartley, *ELR*, 1988, loc.cit., at p.124 (with a critical view of the way the Court used this doctrine). For a different opinion see Travesa, op.cit., pg.15-16, who, in any case, accepts that the Court looked for the "effet utile" of Article 118. Constantinesco,Vlad also refers to this "effet", in op. cit. at p.493. See also the interesting remarks of Mancini, who sustains that the Court did not take formal recourse to the doctrine of implied powers - Mancini, "Il governo dei movimenti migratori ...", op. cit., p.238. For a review of the past controversy on the Commission powers under Article 118 see the Advocate General opinion in the case, in ECR as quoted before, at pp.3220-3224.

[86] See also Travesa, op.cit., pg.16-17 and Simmonds, op.cit., p.199.

global coherence of actions taken both at the national and the Community level.[87] After all the Court itself had previously agreed with the Commission in that :

> "(...) it is important to ensure that migration policies of Member States in relation to non-member countries take into account both common policies and actions taken at Community level, in particular within the framework of Community labour market policy, in order not to jeopardise the results"[88]

Secondly, it may be exaggerated to say that the Commission introduced "a precise obligation on the Member States" and intended

> "to debar them from adopting national measures or concluding agreements that the Commission considers not to be in conformity with Community policies and actions".[89]

It seems clear that the Commission could not achieve through a mere "information and consultation" procedure under Article 118 what it was possible to attain only under other provisions of the EEC Treaty.[90] Thus, in this aspect, the Court's ruling could have been redundant. Another reason for this aspect of the Court's ruling was the need it felt to make some compromise in the dispute at stake, conceding something to the Member States' positions in order to allay their fears.[91]

Although the judgment of the Court in this case received widespread attention, it is perhaps not quite correct to characterise it as a milestone as it has been represented. This is so for two reasons.

On one hand, it seems that the governments of the Member States did not even comply with the Commission resolution, nor did the Commission try to enforce it.[92] Therefore, the Court's validation of the most substantial part of the Commission's decision did not entail by itself an important practical progress.

On the other hand, it could almost be said that the Court's decision just reaffirmed the fundamental aspects of the status quo. The Court's ruling did "not alter the balance of competence as between the Community and the Member States", and its outcome "leaves unanswered the real and pressing need for a common Community policy" regarding workers from non-member countries.[93] However, it is hard to imagine how in this case the Court could have brought a fundamental change to that situation.

The fundamental problem is that, according to the EC Treaty, the agreement of all governments of the Member States is indispensable for the Community to take substantial action in the field of third country nationals.[94] This necessity exists both for the adoption

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87 One should not forget that, after all, the governments of the Member States are responsible for the adoption of Community policies in the Council.

88 Paragraph 16 of the decision of the Court.

89 Idem, paragraph 35.

90 For instance: Articles 100 and 235 for the adoption of EC binding measures and Articles 155 and 169 for the Commission to assure the respect of existing Community rules. See also Article 170 for judicial procedures between Member States.

91 According to Hartley, *ELR*, 1988, op.cit., pg.124, the fact that the Court considered some aspects of the decision void, were simply crumbs thrown to the applicant Member States, the decision being a substantial victory for the Commission.

92 See Mancini, "Il governo dei movimenti migratori ...", op. cit., at pp.238 and 240.

93 O'Keeffe, op.cit., pg.346-347.

94 See, however, the next chapter for a search for means to mitigate this absolute assessment.

of legally binding measures and for the pursuance of productive cooperation. The adoption of EC legally binding measures on third country nationals was and remained completely dependent on the will of the governments of the Member States. This is hardly surprising, considering the analysis made above of the relevant Articles of the EEC Treaty. But neither is it surprising that successful cooperation between EC governments depends on their good will. The governments of the Member States may be obliged to provide information and take part in consultations. Yet, productive cooperation on national policies seems impossible without the will of EC governments to participate. Cooperation as such cannot be imposed.

Within the limits of Article 118, reaching a binding legal stage seems impossible in any case, let alone reaching it without the agreement of the governments of the Member States.[95] The cooperation procedure could eventually lead to the approval of Community legal binding measures, but these would have to be adopted under the normal rules of the Treaty - most probably under Articles 100 or 235, which require a unanimity vote in the Council. In other words, the adoption of legally binding measures would be impossible if the governments of the Member States refused to adopt them, let alone their refusal of the cooperation procedure itself (or information and consultation for it). This seems to be particularly obvious in the field of immigration from third countries. Therefore, it seems clear that, in itself, the Court's ruling, confirming the duty of Member States' governments to participate in the communication and consultation procedure, is less important in practical terms than it may seem at first sight.[96]

The main political message of this case seems to be quite clear. If some governments of the Member States reacted so strongly to the settlement of a mere information and consultation procedure, then, EC measures on third country nationals will not be easily adopted under Article 100 or 235. Developments of the situation in this field, contemporaneous and subsequent to this case, have only confirmed the reluctance of the Member States to take measures within the Community framework. This unwillingness has been fully protected by the rules of the EEC Treaty, at least until now.

Finally, it must be added that almost one year after the Court's ruling, in June 1988, the Commission made a "new" decision on the same subject.[97] Therein the

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[95] Mancini believes that there is a contradiction in Article 118. While that provision assumes that competence on labour related issues belongs to the Member States, it gives the Commission the task of coordinating the actions of the national legislators, with no powers to adopt binding measures for that purpose. See Mancini, G. F., "Il governo dei movimenti migratori ...", op.cit., at pp.236-237.

[96] For the implementation of the results of any cooperation to be any less dependent on the willingness of the Member States, they would have to correspond to existing binding Community Law rules. That could be the case, e.g., of the observation of Community rules on the rights of nationals of one Member State in the labour market of another Member State. In a cooperation procedure, the governments of the Member States could agree to avoid that immigration from third countries prevented unemployed nationals of one Member State from getting a job in another Member State. However, if national rules on immigration from third countries contravened Community Law in that respect, the relevant Community rules would be legally enforced on its own authority, and not, apparently, through Article 118 alone or through the cooperation there provided for. See, in any case, the analysis made on the issue of "Community preference" in the next chapter.

[97] Commission Decision 88/384/EEC, of 8/6/1988, setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, OJ L 183 of 14/7/1988.

Commission removed the two aspects of the former decision that were declared void by the Court of Justice.[98] Apart from that, the new decision reproduced word by word the previous one.[99]

F) DECISION-MAKING PROCEDURES WITH GENERAL SCOPE

The provisions referred to above are certainly insufficient as a legal basis for the adoption of, at least, most measures related to third country nationals. Either they are too vague to form a basis for substantive legal instruments (Articles 117 and 118), or their material scope is simply limited to specific fields (Article 101 and 123, on distortions of competition and the European Social Fund, respectively). In the rest of the areas related to third country nationals, the only ways for the Community to adopt measures seems to be to have recourse to Articles 100 and 235 of the Treaty, or to Article 238, on association agreements with third countries.

1 - Article 100 of the EC Treaty

This Article states that:

> "The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market."[100]

It seems reasonable to argue that legislative differences on most of the issues concerning immigration and immigrants from third countries directly affect the common market. This applies to the abolition of internal border controls, as well as to other issues.[101]

Article 100 happens to be the legal basis of two of the three Commission draft Directives for the abolition of internal border controls on persons, presented on July

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98 These aspects were the reference to the cultural integration of third country workers (and their families) and the objective of consultation for ensuring that the agreements and measures of the Member States "be in conformity with, and do not compromise the results of Community policies and actions".

99 With only one small difference. While, in the first decision, one of the objectives of the consultation was "to facilitate the adoption of a common position by the Member States, particularly as regards international instruments relating to migration", the new decision restates the same objective but it is referred to as "the adoption of a common policy" regarding the same topic.

100 This is the present version of Article 100. In the previous version, before being amended by the Treaty on European Union, the European Parliament and the Economic and Social Committee only had to be consulted "in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation".

101 Timmermans sustains that "there can scarcely be any doubt that, the abolition of internal border controls of *persons*, which is part of the completion of the internal market, depends in part on the creation of a common regime on a number of issues related to immigration and national rules and policies relating to aliens; and that to that extent the Community is competent to enact such a regime by way of harmonisation directives under Article 100 EEC." See Timmermans, C.W.A. "Free Movement of Persons and the Divisions of Powers Between the Community and its Member States - Why do it the intergovernmental way?", in *Free Movement of Persons in Europe...*, op.cit., pp.352-368, at 361.

1995.[102] Under certain conditions, one of these draft Directives grants to third country nationals (who are lawfully in a Member State) the right to travel in the territories of other Member States.[103] In the Preamble of this draft Directive it is precisely mentioned that "the approximation of Member States' laws on this question affects the establishment and functioning of the internal market".[104]

However, Article 100 may also be used on other issues, which 'directly affect the establishment or functioning of the common market' in other aspects, such as the Community labour market. It seems clear, for instance, that the free movement of workers that are nationals of a Member State can be challenged if certain Member States rely on labour imported from third countries to overcome their lack of manpower, instead of making recourse to unemployed nationals of other Member States. The approximation of national immigration laws would then be justified with the aim of assuring the effective functioning of the common labour market.

However, the adoption of positive measures in favour of third country nationals may also be justified in relation to the "establishment or functioning of the common market". The labour and social security laws of a certain Member State may give fewer rights to third country nationals than to the nationals of a EC Member State. This could potentially give the enterprises of that State a competitive advantage over those of other Member States that choose to give the same rights to all workers, regardless of their nationality. To the extent that the difference in protection is relevant and the workers concerned make up an important number, such a situation clearly affects the common market. It would, therefore, justify the adoption of measures by the Community under Article 100.

2 - Article 100A of the EC Treaty

The Single European Act introduced Article 100A in the EEC Treaty, with the aim of facilitating the adoption of Community legislation to establish the internal market. It read as follows:

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[102] Draft Council Directive on the elimination of controls on persons crossing internal frontiers, COM (95) 347, final; Draft Council Directive on the right of third-country nationals to travel in the Community, COM (95) 346, final; both from 12/7/1995. See chapter 4 for an analysis of these Directives. The third Directive for the elimination of controls on persons crossing internal frontiers, was proposed in COM (95) 348 and is based in Articles 49, 54(2) and 63(2) of the EC Treaty. These are the Treaty provisions which based the adoption of the Directives already in force which are to be amended by the proposed draft Directive.

[103] COM (95) 346, final.

[104] Idem, third recital. Note that the present version of Article 100 (as amended by the Treaty on European Union) refers to the 'common market' only, while the Commission refers to the 'internal market'. However, this is not really a problem, since the internal market is not much more than a practical realisation of a true common market. See further the next chapter, on the relation between the two concepts. Note also that Article 100 of the EC Treaty was also the legal basis of a Commission draft Directive on the harmonisation of laws of the Member States to combat illegal migration and illegal employment - see OJ C 277/2 of 1976 (for the first draft) and OJ C 97/9 of 1978 (for the final draft). The Directive would imply the charge of heavy fines on employers knowingly employing an illegal immigrant, and more stringent controls on the arrival of new migrants (e.g., by inland checks). The Council never approved it.

> "By a way of derogation from Article 100, and save where otherwise provided for in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 7A. The Council shall, acting by a qualified majority (...), adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."[105]

However, it was established that this general rule

> "shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons".[106]

This means that the unanimity vote in the Council is still required to adopt EC legislation on the free movement of persons.[107] Likewise, the Single European Act did not change the decision-making procedure under which Article 235 can be used: it still requires an unanimous vote in the Council. This contrasts with the fact that the Single European Act amended several provisions of the EEC Treaty on the Community decision-making procedure. In most fields, after the European Single Act, the adoption of decisions by the Council no longer requires unanimity, but a qualified majority. Such a change did not occur in Article 100 and 235.

In this way, the drafters of the Single European Act, while establishing a very ambitious project in general terms, and facilitating the adoption of EC measures in other fields, left unchanged the rules on the decision making procedure related to third country nationals.[108] In light of the impossibility of a quick judicial enforcement of the obligation to establish an internal market, this maintenance of the old rules on decision-making procedure represents a real political trap. The Member States prepared the way for leaving basically untouched their powers to prevent the adoption of EC measures on the free movement of persons, including measures on third country nationals. This intention is to some extent also expressed by two declarations annexed to the Single European Act. A "General Declaration on Articles 13 to 19 of the Single European Act", made by the Conference of the Representatives of the Governments of the Member States, stated that:

> "Nothing in [its] provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques".

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[105] This is the original version of Article 100A(1), as introduced by the Single European Act. The Treaty on European Union amended it only in the procedural aspects, applying the new Article 189B to it.

[106] Article 100A (2).

[107] It may be interesting to note that, as will be recalled in the next chapter, some times it is sustained that the free movement of persons referred to in Article 7A is limited to nationals of Member States only. This is argued, for example, by the United Kingdom government. If such an assertion was valid, the reference in Article 100A(2) to free movement of persons should be interpreted in a similar manner - and considered to refer only to nationals of a Member State. The result would be that EC measures on third country nationals could be adopted by qualified majority, i.e. under the general rule of Article 100A(1). This result would probably not please the UK government.

[108] Note, however, that Article 59(2), on the possibility of extension to third country nationals of rules related with the free provision of services, was also changed. Before the E.S.A. a unanimous vote was required to adopt measures and after the E.S.A., a qualified majority is sufficient. Nevertheless, this provision was not yet used to enact measures within the Community.

A "political declaration" made on the free movement of persons by the representatives of the governments of the Member States, stated that:

> "In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques."

Nevertheless, it may be noted that Article 100A was used to adopt EC legislation on issues related to public security, traditionally seen as being an exclusive domain of national sovereignty. I refer here to Directives on money laundering,[109] insider dealing,[110] and weapons.[111] They were all based on Article 100A,[112] which requires a connection of EC measures with the objectives of Article 7A. Thus, it may be argued that the public security aspects of issues concerning third country nationals are not an obstacle for the adoption of EC measures, inasmuch as these are justified under the Community objective of establishing an internal market.[113]

3 - Article 235 of the EC Treaty[114]

Community measures on third country nationals can also be adopted under Article 235, which provides that:

> "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting

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[109] Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering, OJ L 166/77 of 1991.

[110] Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ L 334/30 of 18/11/1989.

[111] Council Directive 91/477/EEC of 18 June 1991 on the control of the acquisition and possession of weapons, OJ L 256/51-58 of 13/09/91.

[112] All were also based on the EC Treaty, in general terms. The Directive on money laundering was, in addition, based Article 57(2) thereof.

[113] See also paragraph 25 of cases 281, 283-5 & 287/85, Germany et al. v. Commission. There the Court of Justice declared that the fact that Member States retain their competence to take measures concerning workers who are nationals of non-member countries "which are based on considerations of public policy, public security or public health and which are, as such, their own responsibility", does not mean, that "the whole field of migration policy in relation to non-member countries falls necessarily within the scope of public security".

[114] On Article 235 see Kapteyn & Verloren Van Themaat. op.cit. at pg.114; Mougin, C. Flaesch's commentary to Article 235 in *Traité instituant la CEE - commentaire article par article*, Kovar, Robert & Constantinesco,Vlad et al. (eds.), Paris, Economica, 1992, pp.1509-1539, at pp.1512-13; Usher, John A. "The Gradual Widening of EC Policy, in Particular on the Basis of Articles 100 and 235 EEC Treaty" in *Structures and Dimensions of European Community Policy*, by Schwarze, J. & Schermers, H. G. (eds.), Baden-Baden, Nomos, 1988, at pp.25-36; Weatherill,S. & Beaumont,P., *EC LAW - The Essential Guide to the Legal Workings of the European Community*, London, Penguin, 1993, at pp.119-122. For an analysis of the use of Article 235 in recent times see also Emiliou, Nicholas "Opening Pandora's Box: the Legal Basis of Community Measures before the Court of Justice", *ELR*, Vol. 19, October 1994, No. 5, pp.488-506.

unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."[115]

a) The Relationship between Article 235 and Community Objectives

(i) general

This Article (together with Article 100[116]) restricts the principle of Community limited powers, by granting the Community what are usually called "residual powers".[117] Like Article 100, Article 235 gives the Community a general competence, subject to some requirements. Apparently, this Article is less demanding than is Article 100, as the latter requires that the instruments to be adopted deal with issues which "directly affect the establishment or functioning of the common market". Instead, Article 235 only requires the existence of a need to attain "one of the objectives of the Community". Although that need must be verified "in the course of the operation of the common market", the link of the measure with a strict conception of the common market seems to be less stringent here. Thus we may examine the possibility of using Article 235 concentrating on analysing it in combination with the Preamble of the Treaty of Rome and its Articles 2 and 3.[118]

Common measures in relation to third country nationals could be justified on the basis of a need for ensuring "the abolition, as between Member States, of obstacles to freedom of movement for persons". That could be the justification for a common immigration policy or the extension to third country nationals of the right of freedom of movement for workers. The promotion of "an accelerated raising of the standard of living" and even of "an increase in stability" could justify positive action in relation to third country nationals, namely action against racism and against discrimination or generally on the promotion of their social integration. Moreover, almost any common measure on third country nationals could be explained by the broad Community objective of promoting "closer relations between States belonging to it."

(ii) The Issue in Other Areas

It is important to emphasise that Article 235 has been used to justify action in areas in which the competence of the Community was not explicitly provided for in the EC Treaty. In those fields, the political will of the governments of the Member States was sufficient to overcome legal doubts on the appropriateness of the adoption of EC measures.[119]

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[115] See also the equivalent Articles in the ECSC Treaty (Article 95) and in the EAEC Treaty (Article 203).

[116] As well as with the doctrine of implied powers, namely in the Community external relations.

[117] See Snyder, F. "Competences", in *Butterworths Expert Guide to the European Union*, op.cit.

[118] See, however, that it is common to consider that the Community objectives referred to in Article 235 are not only those that are mentioned in general terms in Article 2 and 3 and the Preamble of the Treaty, but also the objectives mentioned more specifically in other provisions of the Treaty. See Mougin, op.cit. at pp.1512-13 and Kapteyn & Verloren Van Themaat, op.cit., at p.114.

[119] The extent to which political will was here able to overcome the legal objections for such action is a good example of how legal arguments are in general of secondary importance. However, it should also be noted how the lack of political commitment here prevented the adoption of more ambitious measures. Again using legal arguments.

One example is the area of **equal treatment for men and women**. It may be recalled here the Council Directive on the implementation of the principle of equal treatment for men and women which concerned access to employment, vocational training, promotion and working conditions.[120] In this area the Treaty did not give explicit competence to the Community institutions. However, as the Preamble of the said Directive states, in its third recital,

> "equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonisation of living and working conditions while maintaining their improvement are inter alia to be furthered".

Therefore the legal basis of the Directive was declared as being: "the Treaty establishing the European Economic Community, and in particular article 235 thereof". Although approved later than some would have liked,[121] there was enough consensus among Member States for the adoption of this Directive.[122] The main motivation appears to have been that the Community would lose political legitimacy if it were not to act in this field.

Another example can be found in the area of **environmental protection**. This is one of the areas the original Treaty did not explicitly mention. Some EC action was nevertheless taken and EC competence concerning the environment was later formally incorporated into the EEC Treaty by the Single European Act. In itself, this development shows how the political background can determine the interpretation and the use of existing competence. To substantiate this idea we may look at an example of Community action taken before the European Single Act: the Council Directive of 1979 on the conservation of wild birds.[123] The necessary specific powers to act in this field had not been provided for in the Treaty. Therefore the Directive declared that its legal basis was article 235,

> "Whereas the conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary to attain, within the operation of the common market, the Community's objectives regarding the improvement of living conditions, a harmonious development of economic activities throughout the Community and a continuous and balanced expansion...".[124]

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[120] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39/40 of 14/2/1976. Article 235 was also the legal basis of Council Directive 79/7/EEC, of 19 December 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6/24 of 10/1/79. See also Directive 75/117/EEC on the approximation of laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 39/40, of 14/8/86, which was based exclusively in Article 100.

[121] See, for instance, the Defrenne cases - case 80/70 [1971] ECR 445, case 43/75 [1976] ECR 455 and case 149/77, Defrenne (III) v. Sabena [1978] ECR 1365.

[122] Even if later some of the Member States did not fully comply with its rules. See, generally, the Resolution of the European Parliament of 10 March 1988 on the lack of respect of the Directives on equality of treatment between men and women, especially through indirect discrimination, OJ C 94 of 11/4/1988.

[123] Council Directive 79/409/EEC of 2/4/1979 on the conservation of wild birds, OJ L 103/1 of 25/4/1979. This Directive was adopted in the framework of the Second Environmental Action Programme of 1977. See also Directive 80/68 on the protection of ground water against pollution caused by certain dangerous substances, OJ L 20/43 of 26/1/1980.

[124] Preamble of the Directive. Note also the Council Decision 82/72/EEC concluding the Convention on the Conservation of European Wildlife and Natural Habitats, OJ L 38/1, of 10/2/1982. Its Preamble states

This inevitably raises the following question: is EC action on the conservation of wild birds[125] more important to the objectives of the Community than the social integration of third country migrant workers? Especially in terms of "the harmonious development of economic activities throughout the Community and a continuous and balanced expansion" or "the improvement of living conditions"? Is it really possible that, in terms of the "economic and social progress"[126] of the countries of Europe or "in the course of operation of the common market", the life of wild birds is more important than the life of workers coming from third countries? It seems difficult to sustain such an argument.[127]

Similar remarks could be made in relation to other fields in which Community action was taken, but for which EC competence was not directly and explicitly provided for in the EC Treaty.[128]

Furthermore, the broad use of Article 235, due to its open-ended nature, is facilitated by the difficulty of legally controlling what constitutes an actual need for a

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that its legal basis is the EEC Treaty and, "in particular", Article 235 thereof. Its first recital recalls that the aim of the environment policy in the Community (defined in the programme of action adopted by the declaration of 22/11/1973, OJ C 112/1, of 20/12/1973, and supplemented by the resolution of 17 May 1977, OJ C 139/1, of 13/6/1977) was "to improve the setting and quality of life and the surroundings and living conditions of the peoples of the Community". The same recital added that to this end it was "in particular necessary to ensure the sound management of resources and of the natural environment and avoid any exploitation of them which causes significant damage to the ecological balance". Article 100 was also used as legal basis of EC environmental measures before the European Single Act. That was the case of the Council decision of 19 June 1978 concerning the conclusion of the European Convention for the protection of animals kept for farming purposes, OJ L 323/4 of 17/11/78 (also based on the EEC Treaty in general terms and on its Article 43, on common agricultural policy); and the Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes, OJ L 358/1 of 18/12/1986 (also based on the EEC Treaty in general terms). Indirectly, Article 100 was also the legal basis of the Commission Decision of 9 February 1990 setting up an Advisory Committee on the Protection of Animals Used for Experimental and Other Scientific Purposes, OJ L 44/30 of 20/2/90. This Commission decision was based on the Treaty and on the previously mentioned Council Directive 86/609, which in turn was based on the EEC Treaty and on its Article 100.

[125] For instance, migrant wild birds coming from the territory of countries which are not Member States of the EC.

[126] Preamble of the EEC Treaty.

[127] Certainly, this does not mean, in the least manner, that protection of wild birds or other environmental measures are not important in themselves. It just seems to be the case that EC measures on third country nationals are, at least, equally important for the Community.

[128] See, e.g., Regulation 724/75 creating the European Regional Development Fund, in OJ L 73/1 of 1975. Usher recalls also the case of the legislation under which the Community gave the European Investment Bank an unlimited guarantee to cover loans to Hungary and Poland. He comments that such legislation was adopted "(...) under Article 235 yet the jurisdiction appears to be the historical and cultural links with Hungary and Poland. If [one] found this in any objective of the Treaty I would be surprised, but nobody has challenged it and everybody thinks it is a good thing." See Report of the House of Lords Select Committee on the European Communities on "Political Union: Law-Making Powers and Procedures", Session 1990-91, 17th Report, at pg.5 of the part on evidence. Note also the case of Regulation 3181/78, on the European Currency Unit and the European Monetary System, OJ L 379/2, of 30/12/78. It was also adopted under Article 235 and it deals with a matter which is traditionally considered to be a domain of national sovereignty.

measure to attain a Community objective. In this respect Mougin seems to be right when he argues that:

> "Cette notion de nécessité est difficile à cerner car elle revêt des caractères différents selon le contexte dans lequel elle est employée. Dans le cadre de l'article 235, son appréciation n'est pas une operation juridique qui ferait découler, par exemple, la nécessité d'une analyse des conséquences d'une absence d'action communautaire au regard des objectifs du Traité. Elle procède ici d'un jugement de nature économique, technique, politique... mais pas juridique, comme le suggère le terme 'apparaît' employé dans le Traité."[129]

In the meantime, Hartley sustains that Article 235 :

> "confers what can only be termed a general legislative power.[130] For this reason, the theory of limited powers does not seem to be part of Community Law, except to the extent that the Community may legislate only within the general area covered by the Treaties. This consists largely of economic affairs, but social policy is also covered."[131]

The broad possibilities of using Article 235 are only confirmed, in general terms, by the legitimate fear harboured by the Parliaments of some Member States of a loss of their powers on a general and undefined basis.[132] It may also be recalled that the Council

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[129] Mougin, op.cit. at 1516.

[130] Weatherill & Beaumont call it "a very broad law making power(...) to attain one of the objectives of the Community", and speak about the "potentially unlimited legislative power of Article 235", see Weatherill & Beaumont, op.cit., at pp.120-121. Lenaerts goes even further and sustains that: "[t]here simply is, no nucleus of sovereignty that the Member States can invoke, as such, against the Community." See Lenaerts, K. "Constitutionalism and the many faces of federalism", *AJCL*, Vol. 38, 1990, p.205, at 220. See also Weiler, J. "The transformation of Europe", *Yale Law Journal*, Vol.100, 1991, pp.2403-83.

[131] Hartley, T.C. *The Foundations of European Community Law*, 2nd. ed., op.cit., at p.108. While Hartley refers here only to Article 235, similar remarks could be made also in relation to Article 100. As Usher notes, in some cases, "the attempt to explain the use either of Article 100 or Article 235 alone (...) would be somewhat akin to the medieval theological argument as to how many angels could dance on the head of a pin." See Usher, op.cit., at p.35.

[132] That fear is shared, for instance, by the parliaments of Denmark and of the United Kingdom. On the occasion of the accession of Denmark to the European Communities, this Kingdom declared that it acceded to the EEC Treaty on the condition that Article 235 and the theory of implied powers would be interpreted in a strict and cautious way. See Lachmann, "Some Danish reflections on the use of Article 235 of the Rome Treaty", *CMLRev*, Vol.18, 1981, No.4, pp.447-461. See the concerns of the UK's House of Lords on the same matter in its report quoted supra, at pp.30-31. The House of Lords has even raised objections to the use of Article 100A. See the letter written to Jacques Delors, the then president of the Commission, by Baroness Serota, on behalf of the House of Lords. It stated the concern on the use of Article 100A as legal base for measures whose object was the protection of the environment, of the consumer, or the establishment of a new Community policy with substantial budgetary implications. See the House of Lords' 12th report, 1988-89, Correspondence with Ministers, at pg.55. On the abuse of Article 235 see also Weiler, J. & Lockhart, N. " 'Taking rights seriously' seriously: the European Court and its fundamental rights jurisprudence", Part I in *CMLRev*,, Vol.32, 1995, No.1, pp. 51-94, at 65. It may certainly be sustained that Article 100 and 235, and notably the latter, have been used beyond their initial purposes. However, this only emphasises the powers given to the Community by those provisions. The difficulty in having a judicial control on their use emphasises the political discretion of the Council to adopt measures under them. Moreover, in the light of their objectives, it is as legitimate to question the founding of the use of such Articles, as it is legitimate to question the lack of their use (on the political level, not the legal level: see paragraph 95 of the case 22/70, Commission v. Council [ERTA], [1971]

itself has already referred to Article 235 as a possible legal basis for Community measures relating to third country nationals.[133]

The conclusion is therefore that the Community has a potential general competence to act on third country nationals, on the basis and under the conditions established by Articles 100 and 235.[134]

b) The Unanimous Vote in the Council

It may be said that the objectives of the Community mentioned in Articles 2 and 3 and in the Treaty Preamble may include an enormous range of subjects, virtually everything.[135] However, the requirement that the instruments be adopted by unanimity in the Council protects Member States against an uncontrolled extension of Community competence. Under Article 235, as is the case under Article 100, no Member State is obliged to accept any proposal with which it does not agree.[136]

At first sight, the unanimity requirement of Articles 100 and 235 even appears to approximate the decision-making process of the Community with that of the intergovernmental cooperation (under the Title VI of the Treaty on European Union). However there are some important differences between them. One obvious difference lies in the fact that the European Parliament is not so much involved in intergovernmental cooperation. Furthermore, that cooperation is in principle completely outside of the

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ECR 263), namely on issues regarding third country nationals. It may also be pointed out that a negative point in the use of Articles 100 and 235 is the lack of power of the European Parliament to intervene substantially in the procedure for the adoption of EC measures. The European Parliament has only to be consulted, having no power beyond that. As mentioned supra, before the Treaty on European Union, Article 100 only required such consultation "in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation." However, in any case, the lack of perfection of the decision-making procedure of Articles 100 and 235 does not question the fact that they may legitimately be used to act on third country nationals.

[133] See the Council Resolution of 21/1/1974 concerning a Social Action Programme, OJ C 13/1 of 1974. In its sixth recital of the preamble of the resolution it is declared that the items of the programme were to be implemented in accordance with the provisions laid down in the Treaties, including Article 235 of the EEC Treaty. In the main text of the resolution the Council considered necessary and expressed its resolve to promote consultation between the Member States on immigration policies vis-à-vis third countries. The Council even declared the principles on which the Community migration policy was to be based in the future. One of such principles was said to be the accomplishment of equality of treatment in living and working conditions between workers who were nationals of other Member States (and their families) and workers who came from third countries.

[134] Being a potential competence, by its very nature it is not an exclusive competence as such, but a concurrent or shared competence. Only after the Community has acted, if it acts, it then assumes exclusive competence in the field it occupies. See, e.g., Weatherill, in *Legal Issues of the Maastricht Treaty*, op.cit., p.14.

[135] We may remind ourselves again that this would be the case, for instance in relation to the objective of "promot[ing] throughout the Community(...) an accelerated raising of the standard of living", or of promoting "closer relations between the States belonging" to the Community, both referred in Article 2 of the Treaty of Rome.

[136] See Weatherill, S., in *Legal Issues of the Maastricht Treaty*, op.cit., pp.15. Note also that under Article 148(3) "[a]bstentions by members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity".

jurisdiction of the Court of Justice of the European Communities. Last, but not least, in the intergovernmental cooperation the governments of the Member States are not dependent on the Commission. In contrast, in the Community framework the Council can only act on the basis of a proposal from the Commission, which the latter can always alter before its adoption. Besides, the Commission also has the right to withdraw its proposals whenever it believes that to be appropriate - for instance when the Commission does not agree with the amendments that the Council intends to make such proposals.

4 - Article 238 of EC Treaty and EC external competence in relation to third country nationals

As will be described in chapter 5, the Agreements of the Community with third countries are one of the most important sources of Community Law on the legal status of third country nationals in the Member States. These Agreements are mainly based on Article 238 of the EC Treaty,[137] which provides that:

> "The Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures."[138]

When external agreements contain rules on individual persons who are nationals of third countries, they usually regulate their rights as workers in the Member States, or their rights as relatives of such workers. In some cases they also contain rules on their right of

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[137] The Agreements of the Community with third countries, which contain rules on third country nationals in the Member States, have the following legal basis. The Agreement with Turkey and the Additional Protocol to it were adopted by a Council decision (regulation in the case of the Protocol) and were based in general terms in the EEC Treaty, and particularly in its Article 238. The Cooperation Agreements with the Maghreb countries (Algeria, Morocco, Tunisia) were adopted by a Regulation and are based on the EEC Treaty, namely on its Article 238. The Europe Agreements with Poland, Hungary, Czech Republic, Slovakia, Romania, Bulgaria, Slovenia (draft Agreement), and the Baltic countries were adopted by a Council and Commission decision, with assent of the European Parliament, and are based on the ECSC Treaty (in particular on Article 95 thereof in the case of Bulgaria, Slovenia and the Baltic countries); the EC Treaty, in particular Article 238 in conjunction with Article 228 paragraph(3) second subparagraph thereof (mention is also made to the second sentence of paragraph (2) in the Agreements with the Czech Republic, Slovakia, Romania, Bulgaria, Slovenia); and also on the EAEC Treaty in particular 101 thereof. The draft Partnership Agreements with Russia, Ukraine, Moldova, Belarus, the Kyrzyg Republic, Kazakhstan, are to be adopted also by a Council and Commission decision, with assent of European Parliament, and are based on the ECSC Treaty; on the EC Treaty, in particular Articles 113 and 235 in conjunction with 228 paragraph (2) and paragraph (3) second subparagraph thereof (and in Article 54(2), the closing sentence of Article 57(2), and Articles 73C(2), 75, and 84(2) in the case of Belarus); as well as on the EAEC Treaty, in particular Article 101 thereof.

[138] This is the last version of this Article, as amended by the Treaty on European Union. The former versions also made reference to the internal decision-making procedure for the adoption of Association Agreements. This procedure is presently regulated by Article 228 of the EC Treaty, which deals with the internal decision making for negotiation and conclusion of external Agreements in general. Both before and after the entry into force of the Treaty on European Union, unanimity in the Council is required for the Community to concluded association agreements with third countries.

establishment and their right to provide services[139] in the Member States.[140] The inclusion in the external agreements of the Community of such rules on the status of third country nationals in the Member States (e.g. migrant workers) raises the issue of Community external competence on that status.[141]

From the point of view of the governments of the Member States, this is usually not seen as a problem, since those governments regard such external agreements as mixed agreements. This is so because the governments of the Member States considered that some matters covered by the agreements are outside Community competence. One of such matters is precisely the legal status of third country workers.[142] Therefore, these Agreements are concluded with third countries simultaneously by the Community and its Member States. Besides being approved by the Community institutions, these agreements are also ratified by the Parliaments of the Member States.[143]

In the meantime, the interpretation and control of the application of external agreements with rules relating to third country nationals is ensured by the Court of Justice of the European Communities. The Court has declared itself competent to interpret an external agreement.[144] The Court of Justice has based its jurisdiction, namely, on the fact

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[139] Note, however, that only the draft Partnership Agreement with Belarus mentions as its legal basis Article 57(2) of the EC Treaty.

[140] See chapter 5 for more details.

[141] For an analysis of Community external competence in general terms, see Lang, J.T. "The ERTA judgement and the Court's case-law on competence and conflict", *YEL*, Vol.6, 1986, pp.201-218; Lenaerts, K., "La répercussion des compétences de la Communauté Européenne sur les compétences externes des États membres et la question de la 'preemption' ", in *Relations extérieures de la Communauté et marché intérieur: aspects juridiques et fonctionels*, by Demaret, Paul (ed.), Bruges, College of Europe, 1986/ Brussels, Story Scientia, 1988, p.37; Neuwahl, Nanette, *Mixed Agreements: Analysis of the Phenomenon and their legal Significance*, E.U.I., Florence, Ph.D. thesis, 1988; Schermers, H.G. & O'Keeffe, D. (eds.), *Mixed Agreements*, Deventer, Kluwer, 1983; Timmermans, C.W.A. & Völker, E.L.M. (eds.) *Division of powers between the European Communities and their Member States in the field of external relations*, Deventer, Kluwer, 1981. For recent developments see Opinion 1/94 on the Agreement establishing the World Trade Organisation, of 15 November 1994, [1994] ECR I-5267; Opinion 2/92 on the Third Revised Decision on national treatment of the Council of the OECD, of 24 March 1995, [1995] ECR I-521; the Editorial Comments "The aftermath of Opinion 1/94 or how to ensure unity of representation for joint competences", *CMLRev*, Vol.32, 1995, No.2, pp.385-390; and Louis, Jean-Victor , "Les relations extérieures de l'Union Européenne: unité ou complementarité", *RMUE*, Vol.4, 1994, No.1, pp. 5-10. See also, as far as I.L.O. Conventions are concerned, Emiliou, Nicholas "Towards a clearer demarcation line? The division of external relations power between the Community and Member States", *ELR*, Vol. 19, February 1994, No.1, pp.76-86.

[142] See the observations of the German and United Kingdom governments in Case 12/86, Demirel [1987] ECR 3719, at 3725 and 3729, respectively.

[143] On how this procedure began and how it has even been applied even to agreements completely within Community competence, see Torelli, M., comments to Article 238, *Traité instituant la CEE - commentaire article par article*, op.cit., pg.1561 at 1567-8. Torelli refers to the procedure of Article 238 "Une procédure communautaire sous contrôle national", idem, at 1566. Kapteyn & Verloren Van Themaat sustain also that "mixed agreements continue to be used (...) even though on an broader interpretation of the Community's competence (Articles 113 and 238 EEC) this would be unnecessary", *Introduction to the Law of the European Communities*, op.cit., at pg. 776.

[144] See Case 181/73, the Second Haegeman case [1974] ECR 449, paragraphs 3 to 5 of the judgment of the Court (in which was at stake an Association Agreement with Greece), and Case Demirel, quoted

that the agreements are acts of Community institutions, within the meaning of subparagraph (b) of the first paragraph of Article 177. The jurisdiction of the Court of Justice also extends to the interpretation of decisions adopted by an organ established by the agreement and charged with its implementation.[145] Moreover, the Court has ruled that the provisions of external agreements could have direct effect, as well as the rules of Decisions made by the Association Councils set up in their framework.[146]

A contradiction could be found in this situation: the Community acts simultaneously with its Member States when it concludes mixed Agreements with third countries, but the Court of Justice alone has jurisdiction to rule on their interpretation. However, insofar as a contradiction exists, it is perhaps not a legal contradiction. There is a basis for sustaining that the Community itself has competence to include in association agreements with third countries rules on the legal status of third country nationals in the Member States. Likewise, when such Agreements are concluded by the Community, it acts in the exercise of its own powers. In the Demirel case,[147] the Court denied that the inclusion of rules on the status of third country workers (in the event Turkish nationals) in an Association Agreement makes the latter a mixed Agreement. The Court ruled that

> "(...) Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty. Since freedom of movement for workers is, by virtue of Article 48 et seq. of the EEC Treaty, one of the fields covered by that Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238.
>
> Thus the question whether the Court has jurisdiction to rule on the interpretation of a provision in a mixed agreement containing a commitment which only the Member States could enter into in the sphere of their own powers does not arise."[148]

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supra, paragraph 7. For an elaboration on this topic see Weatherill & Beaumont, *EC Law* ..., op.cit., pp.244-245.

[145] Case 30/88, Greece v. Commission, [1989] ECR 3711, paragraphs 12 and 13. In the last paragraph the Court declared that "due to their connection to the agreement that implement, decisions of an Association Council are, as the agreement, an integral part of the EC legal order". See also case C-192/89, S.Z. Sevince V. Staatssecretaris van Justitie [1990] ECR 3461, paragraph 10.

[146] See case Demirel, quoted supra, paragraph 14, in which the Association Agreement with Turkey was at stake (note that in the case the Court ruled against direct effect of the provisions concretely invoked there). Nevertheless the Court ruled that: "A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure." For the decisions of the EC-Turkey Association Council see, e.g., case Sevince, quoted supra, paragraph 15, and case C-18/90, Office National de l'Emploi V. Bahia Kziber, [1991] ECR I-199, paragraph 15. See also case 87/75 Bresciani [1976] ECR 129; case 17/81, Pabst v. Hauptzollamt Oldenburg [1982] ECR 1331; and case 104/78 Kupferberg [1982] ECR 3641.

[147] Case Demirel, quoted supra.

[148] Idem, paragraph 9. The Court rejected the written observations presented by Germany and the United Kingdom according to which the jurisdiction of the Court did not extend to provisions of free movement of workers, as these were provisions whereby Member States had entered into commitments with regard to Turkey in the exercise of their own powers. See paragraph 8 of the judgment of the Court.

The conclusion is that, in the Association Agreement with Turkey, the provisions on free movement of workers were an expression of Community powers and not of Member States powers.[149] Thus, it could be said that, as far as rules on third country nationals are concerned, the external Agreements, concluded by the Community and its Member States, are not mixed Agreements in legal terms. They are mixed agreements only from a political perspective. The political aspect is here quite important, as it cannot be forgotten that the association agreements can only be concluded with the unanimous vote of the Council. This explains the power of the governments of the Member States to insist on considering the Agreements as mixed Agreements. This explains therefore, why association agreements are ratified by national Parliaments.

There is another interesting point regarding the external competence of the Community regarding the legal status of third country nationals in the Member States. The Community, e.g. following the ruling in Demirel, has competence to conclude Agreements containing rules on third country nationals in the Member States. However, it is usually considered not to have competence in adopting internal legal instruments on third country nationals. This leads to suggest the following reasoning, as a solution for this apparent legal discrepancy. Community competence in the external field exists whenever it is necessary for attaining a specific objective for which the Community has powers in its internal system.[150] This is the so-called doctrine of parallel powers - internal and external powers. This doctrine could be applied here, only in the reverse manner than usual: the Community should have recognised internal powers to enact legislation in the sphere in which it has external powers.[151]

However, this reasoning can only show the paradox to which the political operation of the Community leads in this field. In practical and general political terms it is certainly interesting that, in several areas, the most important Community rules on third country nationals are those contained in Agreements with third countries - not in the internal legal instruments of the Community. However, in my view, it should perhaps not be said that there is a fundamental discrepancy between the internal and external powers of the Community in relation to third country nationals. If my findings above are valid, under Article 100 and Article 235 the Community has internal powers to adopt measures relating

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[149] See Weiler, J. "Thou Shalt Not Opress a Stranger (EX.23:9) : On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique", in *Free Movement of Persons in Europe...*, op.cit., pp.248-271, at 256 and 259. See on the jurisdiction of the Court the annotation to the Demirel case by Nolte, Georg, *CMLRev*, Vol. 25, 1988, No.2, pp.403-415, at 407-410.

[150] See case 22/70, Commission v. Council (ERTA) [1971] ECR 263, paragraphs 27 to 31 and Opinion 1/76 [1977] ECR 741, paragraph 3. Hartley recalls that "[a]lthough the European Court has not ruled on the question, there is little doubt that the doctrine of parallelism applies not only with reference to internal powers granted by the Treaty for specific objectives, but also with regard to such general powers as contained in Article 235." See Hartley, T.C., *The Foundations of European Community Law*, 3rd. ed., Oxford, Clarendon Press, 1994, at p.178. See also Snyder, F. "Implied Powers", in *Butterworths Expert Guide to the European Union*, op.cit.

[151] Cf. Hartley & Usher, who comment that "The result is that the Community has international jurisdiction (treaty-making power) in this field, even though it lacks internal jurisdiction - the reverse of the more normal situation. So far, however, no one suggested that the doctrine of 'parallelism' should apply in reverse". See Hartley, T.C. & Usher, J.A., *The Legal Foundations of the Single European Market*, Oxford University Press, 1991, footnote 83 at p.109. In the present author's E.U.I. June-paper (of 1990) that idea was already sustained. See, however, my conclusions on this point in the main text.

to third country nationals. Thus there is not a discrepancy of powers, but a discrepancy in the exercise of powers.

In this respect, it may be useful to recall that the decision making procedure of Articles 100 and 235 requires unanimity for the adoption of decisions in the Council, like Articles 228 and 238. However, whilst the Community has powers to act internally on third country nationals, those powers are not used; they are used in the external agreements. This seems to be caused by the political pressures to which Member States are subject when negotiating external Agreements, not because there is a real difference in the Community's internal and external powers. If a discrepancy or contradiction exists it is one of a political nature, not of a legal one.

In any case, the important point to retain here is that, following the Court's jurisprudence in Demirel, there is a basis for sustaining that the Community has itself competence to include in association agreements with third countries rules on the legal status of third country nationals in the Member States.

CONCLUSION

The answer to the question formulated at the beginning of this chapter is a conditional affirmative one. Yes, the Community has powers to adopt measures vis-à-vis third country nationals. However, the exercise of such powers is basically dependent on an unanimous agreement in the EC Council to use Articles 100 or 235 of the EC Treaty. Such an agreement has been impossible to obtain in the past and in the present political and legal context it is still unlikely to take place.[152]

In section A it was seen that clearly there is no exclusive general Community competence in relation to issues concerning third country nationals. Furthermore, an explicit competence of the Community to act in relation to third country nationals is presently accorded only by a few Treaty provisions. These either have not yet been used - such as Articles 59(2) and the Article 2(3) of the Agreement on Social Policy - or have a limited scope - as Article 100C on visas. Moreover, according to the prevailing view, Article 48 of the Treaty does not apply to third country nationals when it provides for free movement of "workers" in general terms, or when it envisages "the abolition of any discrimination based on nationality between workers of the Member States".[153]

In any case, the relationship between issues concerning third country nationals and Community objectives, as defined in the EC Treaty itself, is grounds for sustaining the Community competence to act in relation to third country nationals. This relationship was emphasised in Section B. There it was shown that such a relationship was already clear under the definition of Community objectives made by the original version of the EEC Treaty. Furthermore, it was argued that it was reinforced by the objective provided by the Single European Act of establishing a single market "without internal frontiers". I suggest that this aim has certain implications for third country nationals. For if the aim of setting

[152] At least in relation to measures of general scope on third country nationals. See, however the analysis made in chapters 8 and 9 of the recent activities of the European Union, notably under its third pillar.
[153] See infra the analysis on the personal scope of Article 48, in chapter 4.

up a market without internal frontiers is to be realised, this implies that third country nationals will be able to move freely from State to State. And if this is so, the need for some regulation of third country nationals will inevitably arise. Though few regulations have been made so far, these are bound, I hold, to be made in the future.[154] The logic of the internal market will lead to further regulation of third country nationals.

Section C analysed the subsidiarity principle and its relevance for Community competence in relation to third country nationals, as far as the for the justification for adoption of EC measures on them is concerned. It was submitted that the formal inclusion of the subsidiarity principle in the EC Treaty, in the new Article 3B, did not exclude or substantially reduce the possibilities for EC action on issues concerning third country nationals.

In section D it was suggested that some EC Treaty provisions could be used for the adoption of measures of narrow scope concerning third country nationals. Particular attention was given to Article 118 and the case Germany et al v. Commission,[155] in which the Court recognised the relevance for the Community of issues concerning migration and migrants from third countries. Still, it was stressed how the case showed the limits of EC Law, as fruitful cooperation between Member States is difficult to impose, let alone by the sole means of Article 118.

Section F examined the decision-making procedures which could be the basis for the adoption of measures with general scope concerning third country nationals.

This section showed that Article 238 can be used in the framework of external agreements to regulate the legal status of third country nationals in the Community. It was recalled that the Demirel case constitute grounds for sustaining that, when such rules are included in external Agreements, the Community is acting in the exercise of its own powers. From a legal perspective, such Agreements are not mixed Agreements for this purpose.

However, section F concentrated on the analysis of Articles 100 and 235 of the EC Treaty. They give the Community a potential general competence of the Community to act in relation to third country nationals. They are the main provisions of the EC Treaty under which the Community may act in that field. Contrary to Article 238, those provisions may be used to adopt internal legislation on issues concerning third country nationals.

It was emphasised that the powers given to the Community by Articles 100 and 235 are broad enough to enable the adoption of EC measures regarding third country nationals. The examples referred to in section F show how the Member States overcome legal doubts on Community competence where the political will to do so existed. The reference to such examples has a legal interest. I argued that if certain other issues are suitably regulated under Article 235, then issues related to third country nationals also ought to be regulated under Article 235.[156] Could, for example, measures on the protection of animals (like migrant birds[157]) be considered more relevant for the

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[154] Even if not within the European Community framework, but under Title VI of the Treaty on European Union.

[155] Quoted supra.

[156] Likewise, action could also be taken under the similar provision of Article 100.

[157] See the quoted supra Council Directive of 1979 on the conservation of wild birds, which was based on Article 235.

Community than measures on human beings who happen to be nationals of third countries? Are the former measures more justified than the latter, or more necessary "to attain, in the course of operation of the common market, one of the objectives of the Community"? I do not think so.

The argument for the use of Article 235 can be developed further. The usual reasons given by the governments of the Member States for refusing the adoption of measures on third country nationals is that the regulation of such matters falls under public order and public security.[158] Another, more general argument, is that regulation in that area belongs to national sovereignty and cannot be dealt with by the Community.

However, two interesting examples serve to question the validity of these objections in the context of the use of Articles 100 and 235. One is Regulation 3181/78, on the European Currency Unit and the European Monetary System.[159] It was adopted under Article 235 and deals with a matter traditionally seen as one of the few formal requirements for the existence of national sovereignty. Another good example is the Directive on the control and acquisition of weapons, namely firearms, adopted under Article 100 of the EEC Treaty.[160] This Directive was one of the measures planned for in the White Paper for the abolition of border controls on persons. Although it concerns an area strictly related to public order and public security, apparently there was no major political difficulty in its adoption.

In this respect, let us note the words of Usher, who, in relation to Articles 100 and 235 of the EC Treaty,

> "(...)wonders if it would be an exaggeration to say that the scope of the Community's competence is ultimately what the Council of Ministers chooses to make it."[161]

On the basis of the foregoing my global conclusion is as follows. The Community has a potential general competence to adopt measures relating to third country nationals. This competence can only be exercised if all governments of the Member States agree to do so, and only to the extent that such measures may be related to the common market or, at least, to the objectives of the Community. In other words: the Community may adopt general measures with respect to third country nationals but mainly under the conditions laid down in Articles 100 or 235. However, such measures have not been adopted by the EC institutions.

Nevertheless, it is important to emphasise that, although no political will existed to adopt EC measures relating to third country nationals, there is no overriding legal obstacle to the adoption of such measures. The point is that the relevant Community rules make the

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[158] See the arguments of the governments of France and the United Kingdom in cases 281, 283-5 & 287/85, Germany et al. v. Commission, op.cit., at pp.3211 and 3233, and dealt with by the Court at paragraph 25 of its decision.

[159] Regulation 3181/78, quoted infra.

[160] Council Directive 91/477/EEC, quoted infra.

[161] Usher, op.cit., at p.36.

possibility of the adoption of such measures completely dependent on the agreement of all Member States.[162] Therefore, we may understand Cruz's statement that:

> "The debate over the Community competence in these fields is really quite irrelevant when account is taken of the fact that without the approval, co-operation and political will of the Member States any attempts to assert such competence is condemned to failure."[163]

Perhaps the relevance of the legal debate on the issue of Community competence is precisely to conclude that legal aspects are not fundamental, in the sense that the freedom of the governments of Member States is clearly demonstrated. The governments of the Member States may refuse to adopt EC measures relating to third country nationals, and may even get away with it.[164] However, they cannot say that the Community does not have the possibility of adopting such measures. In this conclusion lies the interest of the legal debate.

Therefore, the important issue to be analysed is no longer whether the European Community has the legal possibility of taking measures on third country nationals, but whether, under the provisions introduced by the Single European Act, it has a legal obligation to adopt such measures.

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[162] In the words of Weatherill & Beaumont, "the limit on Community legislative competence is not the constraint of the terms of the EC Treaty, but the ability to achieve unanimity in the Council on a legislative proposal", see Weatherill & Beaumont, op.cit., at p.120, footnote 34.

[163] Cruz, A., op.cit., p.14. He adds that "EC States will merely pursue their own separate policies on immigration and third country nationals in accordance with their own interests."

[164] See, however, the next chapter.

Chapter 3

INTERPRETATION AND LEGAL EFFECTS OF ARTICLE 7A OF THE EC TREATY

With Special Regard to Internal Border Controls on Persons

INTRODUCTION

This chapter seeks to interpret and determine the precise legal effects of Article 7A of the EC Treaty.[1] This provision was introduced by the European Single Act, and provides that:

> "The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 7B, 7B, 28, 57(2), 59, 70(1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.
> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

Chapter 2 examined, inter alia, how Article 7A could justify the possibility of adopting measures on immigration matters. Chapter 3 analyses, whether and to what extent Article 7A establishes a legal duty on the Community to adopt such measures - in so far as they are necessary for the establishment of the internal market. This analysis will concentrate on the duty to adopt measures to abolish internal border controls on persons, including controls of third country nationals travelling among Member States. This topic is relevant to the purposes of this thesis. It highlights the relevance of matters related to third country nationals (and their legal position) for the establishment of an essential part of the internal market. Arguably, this is an interesting case study of the place of matters concerning third country nationals within EC integration in general terms.

Section A of this chapter will examine the legal content of the concept of an "internal market". This concept will be compared with the original and still relevant concept of "common market". Furthermore, an attempt will be made to determine what the establishment of an "internal market" requires. It will be discussed whether or not the persistence of controls on persons at the internal borders can be reconciled with the existence of an internal market "without internal frontiers".

Section B proceeds by examining the legal effects of Article 7A, considering the legal remedies available in case of its violation, inasmuch as internal border controls on persons were not entirely abolished by the end of 1992. First, Article 7A is analysed to ascertain whether, or not, it contains the required conditions for its direct effect in this respect. Secondly, the possibility of recognising indirect effect to Article 7A is explored. Thirdly, this section will examine the possibility of success of an action on failure of EC institutions to act to abolish internal border controls on persons. In this context, reference is made to the action in which the European Parliament complained to the Court of Justice that the Commission had not "put forward the necessary proposals to facilitate achieving

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[1] Originally, this provision was numbered Article 8A of the EEC Treaty, and renumbered by the Treaty on European Union. Here the current number (Article 7A) is used so that it is not confused with the current Article 8A, part of the EC Treaty provisions on Union Citizenship. What were originally Articles 8, 8B and 8C, according to the European Single Act, will be referred to also with their current number, according to the Treaty on European Union (i.e. as Articles 7, 7B and 7C) even when reference is made to the European Single Act.

freedom of movement for persons".[2] Some ideas are explored on what could be the future judgment of the Court on the case. Finally, just for the sake of completeness, reference is also made to an eventual non-contractual liability of the Community for violation of Article 7A.

Section C deals with the legal value, for purposes of the interpretation of Article 7A, of the declarations annexed to the Single European Act. Such declarations are analysed from the perspective of the International Law of Treaties, Community Law and national Law.

Article 7A was probably the most controversial, if not the most important among all rules introduced by the Single European Act in the Treaty of Rome. It is perhaps the provision of the Single European Act that most symbolises how this Treaty reopened many points of discussion in the European Communities. These points include, inter alia, old legal concepts, division of powers, the best instruments with which to proceed, and the importance of the Law for European integration.

Rather than being a new match in the same game, the Single European Act introduced new rules for the players, reshaping the old game. Let us find out how much the game was supposed to have changed.

A) WHAT IS AN "INTERNAL MARKET" ?

1 - Internal Market and Common Market

Literature on Community Law is not unanimous on what is the relation between the meaning of the concept of "common market", inscribed on several dispositions of the original Treaty of Rome, and the meaning of the concept of "internal market", defined in the second paragraph of Article 7A, introduced by the Single European Act .

a) On one side, the most extreme position seems to be that of Pescatore, when in 1986 he severely criticised the Single European Act.[3] For him the notion of "common market" is summarised in Articles 2 and 3 of the EEC Treaty, covering a wide range of aspects: the free movement of goods, the freedom to provide services, the freedom to seek employment, the freedom to economic establishment, the freedom to transfer money (for payments and of capital), common rules on competition, rules on non-discrimination, the coordination of economic policies and the harmonisation of economic legislation, as well as a common commercial policy. Thus, the notion of common market virtually coincides with the state of European integration at the time, including the Community Law rules in force and the case-law of the Court of Justice. But, then, in his own words:

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[2] Case C-445/93, Parliament v. Commission, for the abstract of the application of the Parliament see OJ C 1/12 of 4/1/1994. The written phase of the case is already concluded, but there is, as yet, no date set for the oral hearing.

[3] Pescatore, P., "Some Critical Remarks on the 'Single European Act'", *CMLRev*, Vol.24, 1987, No.1, pp.9-18 at 9 and 17. He stated that "the putting into force of the Single European Act will be a setback for the European Community" and that the Act was "the worst piece of drafting I ever came across in my practice of European affairs." Pescatore, naturally, made these remarks before reading the Treaty on European Union.

> "For the well-balanced and complex notion of a 'Common Market' the Single Act substitutes the one-sided notion of an 'internal market' based on an arbitrary selection of Community objectives, ignoring essential features such as the rules of competition, freedom of current payments, economic policy, commercial policy, taxation, non-discrimination, etc."[4]

Furthermore, according to this author, the Single European Act, specially through the new Article 7A, ignored all achievements up to that point and implied that the integration process would have to recommence from scratch. The major danger was that it would threaten "the legal standards attained by the Community in the fields of free movements of goods, persons and services and freedom of financial transfers, as they result, in particular, from the case-law of the Court of Justice."[5] In brief: the internal market would not only be less extensive than the common market, but it could even endanger the achievements of the latter.

Forwood & Clough[6] agree that the internal market has a narrower scope than the common market. While Article 7A would restrict the concept of the internal market to the four fundamental freedoms of movements (of goods, of persons, of services and of capital), Articles 2 and 3 would include "also other matters such as a common commercial policy and coordination of economic activities". The internal market would, finally, not deal with aspects of distortions of competition and of failure to complete the common commercial policy that do not create barriers between Member States.[7] Moreover, Forwood & Clough's analysis shows that Pescatore's fears of the Single European Act eroding the achievements of the Court's case-law were not entirely unfounded. They call attention to certain ambiguities and inconsistencies in Articles 100A and 100B. They also point to the effects that the derogations adopted under them could have

> "on the principle of equivalence of national measures established by the European Court with regard to the free movement of goods and services, and on the new approach to non-tariff barriers in internal trade through the concept of "mutual recognition".[8]

Other authors, however, believe that only in some respects is the notion of the internal market narrower than that of the common market. For example, the common market would guarantee the elimination of governmental and private restraints to trade, while the reference in Article 7A to the absence of "internal frontiers" would make the internal market correspond to the elimination of state barriers only. However this would be a logical consequence of the fact that "private attempts to create restrictions on trade were likely to be an ongoing problem that required ever ongoing efforts", making it

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[4] Idem, p.11.
[5] Ibidem, p. 18.
[6] Forwood, Nicholas & Clough, Mark "The Single European Act and Free Movement - Legal Implications of the Provisions for the Completion of the Internal Market", *ELR*, Vol.11, Dec. 1986, No.6, pp. 383-408.
[7] Idem at p.385.
[8] Forwood and Clough, op. cit., at p.399.

sensible not to include the elimination of private restraints in any programme to be completed within a certain time.[9]

Even Forwood & Clough are not as pessimistic as Pescatore. They consider that "the Single European Act takes as its starting point the existing EEC Treaty as interpreted by the European Court" and that it is clear, that "the purpose of the Single European Act is to go forward from the previous Treaties (...) to make concrete progress towards European Unity".[10] Therefore, they sustain that Member States "must be encouraged to interpret the Single European Act so as not impede the completion of the internal market, or derogate from other objectives of the common market, but rather to achieve the Single European Act political objectives". If any difficulty in building such a "positive" interpretation were to appear, the Commission should obtain the support of the European Parliament for it.

Finally, it should be borne in mind that the persistence of the *acquis communautaire* after the Single European Act is sustained by the majority of legal authors and by the subsequent jurisprudence of the Court of Justice.[11]

b) Secondly, there are those who think that the two concepts are equivalent, that there are no substantial differences between the common market and the internal market.[12] After all, as Ruyt puts it,[13]

> "... la libre circulation effective des personnes, des biens, des services et des capitaux (...) était déjà l'un des objectifs fondamentaux du Traité CEE..."

He adds that :

> "La notion de marché intérieur n'est pas eloignée de celle de 'marché commun' (...) Elle est employée, depuis assez longtemps déjà pour définir ce qui touche au domaine interne à la Communauté par rapport à ses relations extérieurs."

c) Thirdly, they are those who believe that the internal market represents more than the common market. They stress that the internal market signifies more than the simple abolition of barriers to the four freedoms of movement - which constitute the common market.[14] The internal market would also imply the creation of conditions of competition

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[9] Smit, Hans & Herzog, Peter E., *The Law of the European Economic Community - A Commentary on the EEC Treaty*, New York, Bender, 1976-..., p.1-122, at p.1-123.

[10] Idem, p. 406.

[11] On this point see Smit & Herzog, op. cit., p.1-124; Ehlermann, C.D., "The Internal Market Following the Single European Act", *CMLRev*, Vol.24, 1987, No.3, pp.363-409 (with annexes at pp.405-409), at pp. 368-369 and 372; Bosco, Giacinto "Commentaire de L'Acte Unique Européen...", *CDE*, Vol.23, 1987, No.4-5, pp.355-382, at p.371; Glaesner, H.J., "L'Acte Unique Européen", *RMC*, June 1986, No.298, pp.307-321, at p.311, and De Ruyt, Jean, *L'Acte Unique Européen*, Brussels, U.L.B., 1987, at pp.159-160.

[12] On this point see Lasok, D. & Bridge, J.W., *Law and Institutions of the European Communities*, London, Butterworths, 4th ed., 1987, at p.387. They simply mention that "The Common Market is a single 'internal' market embracing several sovereign states(...)". See also Barents, René, who sustains the view that the two concepts are identical in practical terms, "The Internal Market Unlimited: Some Observations on the Legal Basis of the Community Legislation", *CMLRev*, Vol.30, 1993, No. 2, p.85, at p.102-105.

[13] De Ruyt, op.cit., at pp.149-150.

[14] Ehlermann, op.cit., pp. 369-370 and Bosco, op.cit. p.371.

that allow the free circulation of economic factors in an area without internal frontiers.[15] This idea was confirmed by the European Court. It considered that environmental measures intended to eliminate distortions of competition in the internal market were included in the scope of Article 100A.[16] According to others, the internal market would include the implementation of other common policies planned in the Single European Act - for example economic and monetary cooperation.[17] The internal market would also go beyond the common market, in the sense that the latter "does not necessarily imply the elimination of border controls on persons and goods, as long as these controls do not constitute a substantial obstacle to the movement of people or merchandise".[18] The internal market includes the elimination of all internal Community borders and therefore of all border controls. Such elimination is impossible "without the coordination of measures at the Community's external borders" and that, in practice, requires measures concerning the relationship of Member States "with third countries and thus concerns more than a strictly defined 'internal' market'."[19] This is a very important point as it reminds that the internal market needs an external dimension for its full existence.[20]

Pointing in the same direction, i.e. that the internal market is more than the common market, the Commission sustains that:

> "The concept of an 'internal market' is, in principle, the logical extension of a common market - the operation of the Community-wide market under the conditions equivalent to those of a national market."[21]

According to the Commission these conditions include the abolition of all checks and formalities at the internal borders.

d) I propose the idea that both concepts, the common market and the internal market, should be accepted as being open-ended concepts. In some aspects they have roughly the same content and potential, but they have to be interpreted in a certain historical context. They have to be interpreted according to the state of evolution of Community Law, or, in other words, of Community integration.

Only when the economic integration of the Member States attains its perfect state will we be able to say that there is a common market in Europe. A market in which all internal frontiers, all obstacles to movement of economic factors will have been abolished. A market common to all Europeans and to all foreigners allowed to enter therein. A market that is no longer internally divided, constituting a real single market. What would

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15 Ehlermann, op.cit., pp.369-370. He recalls for instance that Article 100A(2), a contrario sensu, includes measures on fiscal issues and on the rights and interests of employed persons in the scope of the internal market programme.

16 Case 300/89, Commission v. Council, "the titanium dioxide case", ECR [1991] 2867, paragraph 23.

17 Bosco, op.cit., p. 371.

18 Smit & Herzog, op.cit., pp.1-124-5.

19 Idem, loc.cit.

20 This is valid for goods as for persons. If either of them are to be free to move inside the territory of the Community, there must be a uniform control at the external borders and even some type of agreement with countries to assure the effectiveness of that control.

21 Communication of the Commission to the Council and the Parliament on the abolition of internal border controls, of 8 May 1992, SEC (92) 877 final, point 2. See also the Commission Communication on the abolition of frontier controls, COM (91) 549, of 18/12/1991.

be the difference between calling it the common or the internal... market? On that utopian day perhaps none. Yet, from our current position it is important to understand why the Single European Act introduced a new concept. This occurred because the internal market was meant to be a progress within the process of European integration. The establishment of the single European market was agreed upon as a means of developing the state of the common market at the time.

From a legal perspective, all or most of the measures included in the White Paper of the Commission of 1985 could have been approved earlier, using the competences and concepts already available. But they simply were not. Therefore, some progress had to be made. The will for progress materialised in the Single European Act. It resulted in the creation of new instruments[22] to attain within a certain period an objective now redefined.

The major difference between this new objective, the internal market, and the existing common market at the time, is, in concrete and symbolic terms, the abolition of internal frontiers. The Community market was supposed to become so perfect as to have no frontiers between the Member States, in the sense that they would not be obstacles to freedom of movement. The aim was not only that it should be possible to pass across these frontiers relatively easily, but that the frontiers controls themselves should disappear altogether.[23]

2) What Does the Establishment of an Internal Market Require? [24]

a) In general terms

The general definitions of Article 7A are insufficient to ascertain what exactly is required to attain a true internal market. How far should we go to have a complete "free movement of goods, persons, services and capital", as if there were no "internal frontiers"?

Some issues raised in this context are easier to solve than others. For instance it may be easily understood that the internal market, as a Community legal concept, would have some inherent limitations. These derive from other provisions of the EEC Treaty, or of the Acts of Accession to it. As these have the same legal value as Article 7A, the latter would have to be construed as limited by them. In this way Articles 36, 48(3), 56(1) and 66 of the EEC Treaty[25] are still valid after 1992, even though they amount to real limitations of the internal market. In the same position would be the secondary sources of

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[22] E.g. new competences and a greater use of the qualified majority voting in the Council.

[23] Completing the Internal Market, White Paper from the Commission to the European Council of 28-29 June, COM (85) 310 final, point 27.

[24] See, in a deeper perspective, Dehousse, R., *Integration v. Regulation? Social Regulation in the European Community*, EUI Working Paper, Law, No.92/23; Majone, G., *Deregulation or Re-Regulation? Policymaking in the European Community Since the Single Act*, EUI Working Paper, SPS, No.93/2; Snyder,F., *New Directions in European Community law*, London, Weidenfeld & Nicolson, 1990, chapter 3; Strange, Susan, "A Dissident View", in *1992: One European Market?*, Bieber, R., Dehousse, R., Pinder, J. & Weiler, J.H.H. (eds.), Baden-Baden, Nomos, 1992, p.73; Woolcock, S., *The Single European Market - Centralization or Competition among National Rules?*, London, Royal Institute of International Affairs, 1994.

[25] As interpreted by the Court of Justice, and provided they were not Community instruments coordinating national measures on issues dealt with by those Treaty provisions.

Community Law having as their legal basis the derogatory provisions of Articles 7C, 100A and 100B.[26] Similar remarks could apply to exceptions to the internal market made in specific fields, such as the movement of toxic waste, or of national treasures and works of art. Limitations on their movement are based on legitimate values, protected by Community Law.

Yet the problem is not so easy to solve in respect of other fields, in relation to which the complete freedom of movement within the internal market is not fully assured either. I refer here to fields like air transport, purchase of cars, or recognition of diplomas. As far as these fields are concerned, it may be questioned whether the Community did achieve the objective of establishing an internal market in which complete freedom of movement would be assured. In some cases the Community has even adopted legal instruments to regulate these fields, in which the full implementation of the internal market is clearly postponed to after 1 January 1993. However, these instruments do not have as their legal basis the provisions of the EC Treaty which would allow for derogations from the objective of Article 7A. Would they not amount to clear violations of Article 7A?

Nevertheless there are still more difficult questions. What would be the necessary level of equality of conditions of competition? In what field? Until what point would harmonisation have to go in respect of the obligations of enterprises in the labour and social field, for instance? How far would the concept of indirect discrimination have to be developed to effectively end barriers of movement? In an extreme hypothesis, should we consider that a community worker, living in a different Member State, should maintain all his or her voting rights? To be exercised either on his country of origin, or in that of residence? Another relevant issue in this context is reverse discrimination. Is this acceptable in a market with no frontiers and with homogeneous conditions of competition?[27]

Probably some answers to any of these questions would constitute a limitation of the scope of a true single market. From this it may be concluded that the internal market will only be defined by what the institutions and the Member States of the Community are prepared to do at this stage of European integration. However, what is of interest here is the definition of the internal market as a legal concept. What was the Community supposed to do when the Member States accepted the goal of establishing an internal market?

Let us now concentrate on a specific area.

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[26] Cf. Schockweiler, F., "Les conséquences de l'expiration du délai imparti pour l'établissement du marché intérieur", *RMCUE*, 1991, No. 353, pp.882-886, at 885.

[27] See in section B of the next chapter my remarks on reverse discrimination.

b) The case of border controls on persons[28]

Does the establishment of a market "without internal frontiers", allow the existence of controls at the internal frontiers? For instance on persons?

The particular importance of this issue arises from two facts. On one hand, border controls on persons have not yet been entirely abolished and it appears they will be maintained in the near future. On the other hand, arrangements for their progressive abolition have been taken within the intergovernmental cooperation procedure. Here, I will only try to ascertain if an internal market is compatible with the existence of border controls on persons, and if it is, to what extent and under what conditions.

(i) Firstly, it is important to recall that the objective of eliminating all police and customs controls at the frontiers is not at all a new idea. It is not an idea of supporters of the European utopia, which had no expression at the level of the Community institutions. On the contrary, for more a decade now, it forms part of the official plans of the latter. That objective was already mentioned in the Tindemans report of 1972.[29] Furthermore, in the mandate of the European Council of Fontainebleau, of June 1984, to the Ad Hoc Committee on the People's Europe, the same objective was said to be part of the measures to take to "reinforce and promote the Community's identity and image among its citizens and in the world".[30]

Later on, this objective was placed in the framework of the completion of the internal market. The White Paper of the Commission expressly deals with the issue underlining that the objective of its programme was "not merely to simplify existing procedures, but do away with internal frontier controls in their entirety."[31] To this end, a wide range of measures was proposed. The adoption of directives on, inter alia, arms and drugs' legislation, visa policy, third country nationals legal status', extradition and police controls, was planned to establish conditions on which a complete freedom of movement of persons could be achieved.

The White Paper programme was approved by the European Council of Milan.[32] It was also mentioned in Declaration No.3 of the Intergovernmental Conference which approved the Single European Act. That Declaration states that:

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[28] For an overview of the problems regarding internal border controls, see Alderson, J., "Are Border Controls Necessary?", in *1992: One European Market?*, op.cit., pp.303-8; Ayral, Michel "La suppression des contrôles aux frontières intra-communautaires", in *RMUE*, Vol.3, 1993, No.1, p.13; and Donner, J.P.H., "Abolition of Border Controls", in *Free Movement of Persons in Europe: Legal Problems and Experiences*, T.M.C. Asser Institute Colloquium on European Law, Session XXI, 1991, Schermers, H.G. et al. (eds.), Dordrecht, Martinus Nijhoof, 1993, p.5; and Philip, Allan Butt, *European Border Controls: Who Needs Them?*, RIIA Discussion Papers No.19, London, Royal Institute of International Affairs, 1989.

[29] Report by the Belgian Prime Minister Tindemans to the President of the Commission and the Conference of Heads of State and Prime Ministers on the further development of the Community, Supplement of Bull. EC, 1/1976.

[30] Bull. EC, 6/1984, p.11.

[31] White Paper, quoted supra, point 27.

[32] It is often said that the Council approved the White Paper of the Commission without reservations. However, for details see the conclusions of the European Council of Milan in the Bull. EC, 6/1985. The European Council "welcomed the White Paper" and "instructed the Council to initiate a precise programme of action for its implementation. It also "requested the Commission to submit its proposals swiftly and the Council to ensure that they were adopted within the deadlines established in the

> "The conference wishes by means of the provisions in Article 7A to express its firm political will to take before 1 January 1993 the decisions necessary to complete the internal market defined in those provisions, and more particularly the decisions necessary to implement the Commission's programme described in the White Paper on the Internal Market".

Although this was made to justify the limits declared for the date set in Article 7A, it nevertheless clearly establishes the programme of the White Paper as the basic reference for the content of the internal market,[33] at least in the minds of those who signed the Single European Act.

This is quite an important point as there seems to be no good argument (whether literal, systematic, or teleological) to support the idea that the complete abolition of border controls should not be included in the establishment of the internal market.

The Commission, in its Communication presenting its view on the interpretation of Article 7A,[34] stated that "the continued existence of just one [check or formality at internal borders] would undermine the political dimension of the objective laid down" in Article 7A. I would stress that it would also constitute a violation of that rule, a fact of not just political, but concrete legal relevance. Further on, in the same document, in order to justify that all border controls should be abolished, the Commission invokes the case-law of the European Court that "equated the internal market with a national market".[35] However, this should not overly impress an informed reader, as the case quoted dates from a time when the state of development of the Community Law made the Court admit, in another case, that Member States could maintain frontier controls on the movement of persons, so long as no excessive restrictions were imposed.[36] Recent jurisprudence generally confirms this idea. Routine and systematic questioning of those entering the territory, concerning the purpose and duration of their journeys and their financial means, were held contrary to Community Law.[37] However, spot checks were permitted.[38]

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timetable". Nevertheless, it did not include in the priority areas the abolition of physical barriers to free movement of persons. See Bull. EC, 6/1985, point 1.2.5.1. and also points 1.2.2 and 1.2.3 on the Council conclusions on institutional affairs and on "A People's Europe", respectively.

[33] Cf. Ruyt, op.cit., at 153-4, who, when referring to the same declaration, states that "(...) la référence au Livre Blanc qui y figure fait entrer (...) l'ensemble des propositions qu'il contient dans le domaine de la compétence communautaire".

[34] Communication on the lifting of internal border controls, of 8 May 1992, SEC (92) 877 final. See also the Commission's statement on the Report of the Ministers responsible for immigration on the implementation of Article 8A (7A) on the free movement of persons (submitted to the European Council of Copenhagen of June 1993 - IP/93/434, 3 June 1993; Council Press Release (6712/93, Press 90), 2 June 1993.

[35] Idem. The case quoted was Schul. There the common market was defined as involving "the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market, bringing about conditions as close as possible to those of a genuine internal market". See case 15/81, Schul [1982] ECR 1409, paragraph 33.

[36] See, e.g., case 118/75, Watson [1976] ECR 1185.

[37] Case C-68/89, Commission v. Netherlands, [1991] ECR I-2637. See in particular paragraph 10.

[38] Case 321/87, Commission v. Belgium [1989] ECR 997. On the case-law of the Court of Justice on compatibility of national border controls on persons with Community Law, but independently of Article 7A, see O'Keeffe, D., "Trends in the Free Movement of Persons", in *Human Rights and Constitutional Law: Essays in Honour of Mr. Justice Walsh*, O'Reilly (ed.), Dublin, Round Hall P., 1992, p.263-291, at

(ii) Nevertheless, the point remains that border controls on persons should be completely abolished in a market "without internal frontiers". They should cease to be applied to all persons, whether economically active or not, whether nationals of a Member State or not. I would like to put forward two arguments to sustain this viewpoint.[39]

Firstly, it appears from the wording of Article 7A and of other dispositions of the Single European Act, that no difference should exist between the degree of freedom to be attained for movements of persons and for other economic factors. In fact, the second paragraph of Article 7B even established that:

> "The Council (...) shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned."

In what relates to goods, services and capital, the complete freedom of movement was either already achieved or was specifically planned to be so in the EEC Treaty itself. This holds even for goods, services and capital authorised to come from third countries. As far as goods are concerned, those products and raw materials coming from third countries, once allowed to enter into the territory of a Member State, have for a long time been able to enter into free circulation in the Community. Restrictions to this general principle were to be abolished by 1 January 1993. Furthermore, as far as capital is concerned, Article 67 already established the abolition

> "(...) of restrictions on movement of capital belonging to persons resident in Member States and any discrimination based on the nationality(...)".

Then, the Single European Act amended Article 70 in order to provide that :

> "the Commission shall propose to the Council measures for the progressive coordination of the exchange policies of Member States in respect of the movement of capital between those States and third countries. (...) It shall endeavour to attain the highest possible degree of liberalisation."

Moreover, in the case of services, Article 59, as amended by the Single European Act, allowed the Council,

> "acting by a qualified majority on a proposal from the Commission, to extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community".

The conclusion is that it does not make much sense if the free movement of persons is to be the only fundamental freedom to be interpreted in a restrictive way.

Secondly, this is the only interpretation that gives full utility to Article 7A. It is not possible to control exclusively third country nationals (or any other category of persons) at the Community internal borders. To check the nationality of a person, the police has to ask for the identification document of that person. Thus, everyone crossing borders has to

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277-8. See also O'Keeffe, D., "The Free Movement of Persons and the Single Market", *ELR*, Vol.17, 1992, No.1, pp.3-19, at 8-11.

[39] See also, e.g., the Martin report on the incompatibility of passport checks carried out by certain airlines with Article 7A of the EC Treaty, of 17/12/1994, made on behalf of the Committee on Legal Affairs and Citizens' Rights of the European Parliament, doc.ref. A3-81/94.

be controlled, at least to ascertain his or her nationality.[40] There seems to be no way to avoid this.

Following the positions of some Member States, the question has been raised whether the reference Article 7A to "persons" includes nationals from third countries or only refers to nationals of the Member States. The government of the United Kingdom suggested that the control of third country nationals could only be achieved with specific procedures for these people.[41] While nationals of third countries would continue to be submitted to full checks and procedures at the borders (as they are now), nationals of a Member State would only need to pass by a police officer and wave their Community passport.[42] They would only be submitted to sporadic checks of identity.

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[40] Cf. Jessurun D'Oliveira, H.U. "Fortress Europe and (extra-communitarian) refugees: cooperation in sealing off the external borders"; and Timmermans, C.W.A., "Free Movement of Persons and the Divisions of Powers Between the Community and its Member States - Why do it the intergovernmental way?", both in *Free Movement of Persons in Europe...*, op.cit., p.166 at 170 and p.352 at 357, respectively.

[41] The United Kingdom governments have kept a persistent resistance to the abolition of border controls. Their abolition is seen as negative, due to the special situation of that country. The fact of being an island is seen as an advantage that would be lost had the border controls have to be abolished. The inconvenient of the abolition of border controls was seen as being primarily that of losing an important possibility of controlling crime. In this respect the Home Secretary Mr. Baker was reported as having declared that: "Britain will not surrender the advantages of being an island, which makes it easy to control drugs, terrorists, illegal immigrants and rabies". See Boris Johnson's article "EC Anger at British Stand on Frontiers", Daily Telegraph, 16 January 1992(emphasis added). A further inconvenient of the abolition of border controls in the UK would be the eventual need to impose, as a compensatory measure, the use of identity cards - an idea common in the continental Europe, but unknown in the Anglo-Saxon legal system. See O'Keeffe, D. "Non-Accession to the Schengen Convention: The cases of the United Kingdom and Ireland" in *Schengen en Panne*, Pauly, Alexis (ed.) Maastricht, EIPA, 1994, p.145. Note, in the meantime, that in April 1995 the British Prime Minister John Major announced that his government was planning to introduce identification cards in Britain. For an analysis of the present issues regarding the eventual introduction of compulsory identity cards in the United Kingdom, with reference to the historical background, see Thomas, Philip A. "Identity Cards", *MLR.*, Vol.58, September 1995, No.5, pp.702-713, and the UK's government Green Paper on Identity Cards, Cm 2879, London, HMSO, May 1995.

[42] This was called the *Bangeman wave*, the name being taken from the European Commissioner who was supposed to have agreed with the idea during a visit to the United Kingdom. In this respect it may be recalled that, according to the resolution on the adoption of a passport of uniform pattern, Member States can grant to "other persons" (which could perhaps be for example third country nationals resident in their territory) a passport of the same type as the uniform passport available to nationals of the Member States of the European Communities. See point B of Annex II of the Resolution of the Representatives of the Governments of the Member States of the European Communities, meeting within the Council, of 23 June 1981, OJ C 241/1 of 1981 (amended by resolution of representatives of the same governments of 30 June 1982). This could eventually lead to loopholes in the effectiveness of the *Bangeman wave*. Note also the case of Moluccans, to whom the Dutch government granted passports in which it is stated that they are Dutch citizens, even when that is not the case. See Jessurun D'Oliveira, H.U., "Expanding External and Shrinking Internal Borders: Europe's Defence Mechanisms in the Areas of Free Movement, Immigration and Asylum" in *Legal Issues of the Maastricht Treaty*, O'Keeffe, D. & Twomey, P. (eds.), London, Chancery, 1994, p.261, at 268-9. Note that several EC Regulations accord the right of entry in another Member State on production of a passport of a Member State. See, for example, Article 3(1) of Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers and members of their families, OJ L 257/13, of 19/10/68. That provision establishes that Member States shall allow workers who are nationals of another Member State (and their relatives entitled to go with them) "to enter their territory simply on production of a valid identity card or passport".

However feeble that control may seem, it still is a control. It is not typical of an area without internal frontiers. Besides, it is obvious that it could not ensure a high degree of security. It would seriously jeopardise the aims of both different policies - total control and no control. We, then, have to agree with the Commission when it concludes that:

> "The completion of the internal market requires the abolition of physical frontiers between Member States so as to ensure the free movement of goods, persons, services and capital under the terms of Article 7A. This objective will not be achieved if some goods or persons are still subject to controls when they cross internal frontiers. If, for whatever reason, some controls do remain after 1 January 1993, the Community and the Member States will have failed to fulfil their obligation to produce results laid down in the Single European Act."[43]

Yet, the fact that third country nationals would not be controlled when crossing internal borders does not mean that they would be granted a right of residence or even the access to economic activities in other Member States.[44]

I would add one comment to these Commission remarks. Contrary to the Commission I do not believe that every frontier control made after the beginning of 1993 is necessarily contrary to Community Law. The Commission admitted in its communication that:

> "As happens in a national market, the Community, or, where appropriate, Member States may prohibit or restrict the placing of certain products on the internal market within the limits laid down in Article 36 EEC, but the exercise of these powers may not involve controls at internal frontiers."[45]

However, it could be that, in certain situations, it would be legitimate to make controls of persons at the Community internal borders. Such controls would be legitimate provided they were justified on compelling reasons of public interest; and they did not represent regular border controls in disguise.[46] They should also be as sporadic and as legitimate as any other police control carried out within the internal territory of a Member State. If there was an objective justification for such controls, one could consider them compatible with Community Law. However, I refer here to a marginal situation, one that would rarely arise, not the one at stake in the every day practice of border controls. This perspective is in accordance with the Court of Justice's doctrine of limiting the possibilities of performing

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[43] Commission Communication of 8 May 1992, quoted supra, at point 10.

[44] The Commission has stated that the establishment of an internal market would entail the right of third country nationals to move within the territory of the Member States. However, this right to move, "would carry with it no right of residence or work throughout the Community even for those non-Community citizens who have been granted such a right in a particular Member State". See "Completing the Internal Market: an Area without Internal Frontiers, Progress Report required by Article 8B of the Treaty", COM (90) 552 final, Brussels, 23 November 1990. See also Timmermans, "Free Movement of Persons and the Divisions of Powers Between ...", op.cit., at p. 356. In any case, it can be argued that a true internal market can only exist if Community rules on free movement of persons apply also to resident third country nationals, at least to those who have resided in a Member State for a certain period of time.

[45] Commission Communication of 8 May 1992, quoted supra, point 5.

[46] For instance, if a person is kidnapped in a region near a frontier, the police should be allowed to make road blocks to search for the kidnappers.

border controls of EC nationals.[47] Rare and duly justified police controls are not a problem.[48] What should disappear are systematic border controls.

B - REMEDIES FOR VIOLATION OF ARTICLE 7A

This section will examine the legal utility of Article 7A. It will analyse its effects and the remedies available for its violation.

This section will examine three possible remedies against violation of Article 7A. The first concerns its direct effect. The second relates to its indirect effect. The third regards legal action against failure of the Community institutions to act (namely the Commission and the Council). Finally, this section will also examine the possibility for an individual to claim damages from the Community based on its non-contractual liability for violation of Article 7A, inasmuch as the objective of the establishment of the internal market was not attained due to failure to act of EC institutions. Again, all these questions will be analysed having special regard to the abolition of border controls on persons.

1 - Preliminary Rulings and conditions of Direct Effect

An individual could benefit from the preliminary rulings procedure of Article 177 of the EEC Treaty when arguing in a national court against a measure maintaining barriers to the internal market. However, he or she could only do it successfully if Article 7A was considered to have direct effect.[49]

The European Court of Justice has already attributed direct effect to several articles of the EEC Treaty,[50] even when their implementation was to proceed through

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[47] Timmermans recalls the doctrine of the Court of Justice on the necessity and proportionality of border controls, e.g., in case 321/87, Commission v. Belgium, quoted supra, and in case 363/89, Daniel Roux v. Belgium [1991] ECR I-273. See "Free Movement of Persons and the Divisions of Powers Between ...", in *Free Movement of Persons in Europe...*, op.cit., p.352 at 357. Recently, although in relation to goods, the Court confirmed its doctrine that systematic inspections are not allowed at the borders of the Member States. The Court declared that a rule of EC Law on Agriculture should be interpreted as to allow for spot checks only. Furthermore these were declared permissible only because they were aimed at preventing fraud with regard to the quality and composition of goods qualifying for export refunds. This aim was considered a legitimate concern of the Member States. The Court based its decision on Articles 30 and 34 of the EEC Treaty. See case C-426/92 Germany v. Deutsches Milch-Kontor GmbH, [1994] ECR I-2757.

[48] Note also that Article 2 of the draft Directive on the elimination of controls on persons crossing internal frontiers, proposed by the Commission on 12/7/195, allows for the temporary reinstatement of border controls, in case of "a serious threat to public policy or public security". Yet, these controls "shall not exceed what is strictly necessary to respond to the serious threat", according to Article 2(3) of the same instrument. See the draft Directive proposed in COM (95) 347 final, referred to in further detail infra, in the next section of this chapter. That draft Directive is analysed in chapter 4.

[49] Here what seems particularly relevant is the vertical direct effect of that provision, given the fact that internal border controls on persons are usually performed by public authorities. However, the relevance of horizontal direct effect of Article 7A, i.e. between private parties, is not to be excluded. Such effect was uphold by the Court in relation to other EC Treaty provisions. See, e.g., case 43/75, Defrenne v. Sabena [1976] ECR 455 at 473.

[50] For a full reference to the provisions of the EC Treaty to which the Court of Justice has already granted direct effect, see Lasok, D. & Bridge, J.W., *Law and Institutions of the European Union*, London,

other instruments of Community Law. These other instruments were either acts of the Community institutions and of the Member States, or of the latter acting alone. The point, therefore, is to determine whether Article 7A could have direct effect.[51] I agree it may not be easy to justify the proposition that Article 7A has direct effect, but I also believe it is not completely absurd to sustain it, at least for some aspects of the internal market.

Direct effect is conferred on rules creating obligations considered to be clear and precise, unconditional and that leave no margin of discretion to the Community institutions or the Member States.[52] The following analysis seeks to determine whether Article 7A fulfils these conditions.

a) The obligation should be clear and precise

It has been said that the language of Article 7A is "less mandatory in tone"[53] and established a less clear programme than that of Article 7 - which was recognised as having direct effect by the European Court. I would like to put forward the idea that perhaps this is not a totally valid argument.

The fact is that there were special circumstances surrounding Article 7. It had to have such a concrete programme. In order to allow State Parties to derogate from some of the duties of the Agreement (namely the most-favoured nation clause), Article XXIV of GATT required a "plan and schedule", to be realised "within a reasonable time". By contrast, Article 7A had no such problems with GATT. Besides, Article 7A should be read in relation to other provisions introduced by the Single European Act, like Articles 7B, 100A and, particularly, Article 100B as a kind of last call for boarding. Thus, it can be said that a complete programme was set. Moreover, Article 7A does not allow for any discretion on the final date of its implementation, as does, to a certain extent, Article 7. A proposal allowing for the possibility of the Council, by a unanimous decision, postponing the deadline, of the end of 1992, was raised in the Intergovernmental Conference which approved the E.S.A. But it was not accepted.[54] Finally, Article 7A imposes on the Community the establishment by 31 December 1992 of an area *without internal frontiers.* Is it not clear that the Single European Act created a new objective in the EEC Treaty: the suppression of internal frontiers and therefore of border controls and formalities? Would it be inaccurate to say that, in this regard, the obligation created by Article 7A is clear and precise?

Butterworths, 1994, pp.294-300, particularly at pp.296-7; and Schermers, H.G. & Waelbroeck, D., *Judicial Protection in the European Communities*, 5th ed., Deventer, Kluwer, 1992, pp. 145-148.

[51] For arguments in favour of direct effect of Article 7A see Louis, J.V. and Kovar, M. in *L'Acte Unique Européen - table ronde de Strasbourg, 14 Mars 1986*, Université des Sciences Juridiques, Politiques, Sociales et de Technologie de Strasbourg, 1986, at pp. 15, 20 and 21.

[52] Cf., e.g., Kapteyn, P.J.G. & Verloren Van Themaat, P., *Introduction to the Law of the European Communities*, 2nd.ed., Deventer, Kluwer, 1989, p.333.

[53] Smit & Herzog, op.cit., p.1-125.

[54] See, e.g., Ruyt., op.cit., at 157. As explained below, in the view of the final version of Article 7A and of general principles of EC Law, Schermers rejects the compatibility with Community Law of such an eventual decision of the Council. See Schermers, H., "The effect of the date 31 December 1992", *CMLRev*, Vol.28, 1991, No.2, pp.275-289, at pp.282-285.

b) The obligation should be unconditional and unqualified

The time limit of the obligation contained in Article 7A expired on 31 December 1992. Thus, in this respect, the obligation is conditional no more. Other problems, though, are still to be solved.

ba) Some argue against the direct effect of Article 7A recalling the final reference of both its paragraphs.

The first paragraph prescribes that measures to establish the internal market should be taken in accordance with the new articles introduced by the Single European Act and "without prejudice to the other provisions of this Treaty." The second paragraph mentions that, in the internal market, "the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." In brief, this would seem to imply that Article 7A was of a programmatic nature only, requiring implementing measures to be enacted under other provisions of the Treaty. However, it may be argued that this would be only the normal manner for Article 7A to operate. Its direct effect would be exceptional, due to the absence of Community measures implementing the objective of the Article. This type of situation is similar to that of several articles of the Treaty for which direct effect has been recognised.

On the other hand, there is the *possibility* that the signatory governments did add those final references in order to diminish the possibilities of Article 7A being found to have direct effect. In fact, the references appear redundant. What was the alternative? If the internal market was not to be established according to the rules of the Treaty, then according to which rules was it to be established?

However, perhaps one could sustain, on the same grounds, that the phrase "the internal market (...) is ensured in accordance with the provisions of this Treaty", means that the usual provisions of the Treaty for enforcement of Community Law would also apply to Article 7A. For instance those giving the European Court authority to recognise direct effect.

Finally, another point takes us to a curious aspect of "the other dispositions" argument, a point which has particular relevance as far as ad hoc intergovernmental cooperation is concerned. Part of the ad hoc intergovernmental cooperation functioned with Community funds, had the blessing of the European Council (a Community institution), and sought officially to implement part of the internal market. However, it did not work under the rules of the EEC Treaty. Did it, therefore, infringe Community Law, in particular the final references of both paragraphs of Article 7A? [55]

bb) Another argument has been presented, which in some measure elaborates on the argument related with the final reference of Article 7A - that the establishment of the internal market was to be made in accordance to certain provisions of the EC Treaty, "without prejudice to the other provisions". It has been claimed that the implementation of the internal market requires positive action, which cannot be substituted by any ruling of the Court attributing direct effect to Article 7A. Schockweiler has even claimed that what was left to be done, i.e. what the Single European Act wanted to abolish, were barriers

[55] For an analysis of this issue in general terms, see section A of chapter 6.

that the Court could not eliminate through the doctrine of direct effect.[56] This doctrine could not eliminate those barriers, either because such elimination would require coordination or harmonisation of national rules, or because the barriers are founded on the EC's derogatory rules - such as Article 36, or similar, as well as on the "rule of reason" of the Court of Justice's doctrine.[57]

However, it should be stressed that the Court has already considered that, simply because a provision includes an obligation to adopt implementing measures, it does not follow that its direct effect is dependent on the enactment of those measures.[58] This dependence would only exist if the implementing institution or Member State was left with some margin of discretion. I will discuss this point later. Meanwhile it could, perhaps, be noted that there is a specific field in which Article 7A could have direct effect, with no special implementing measures being indispensable to achieve that effect. I refer to border controls. In this respect the ruling of the Court of Justice in the Defrenne case can be recalled.[59] There, Article 119 of the EEC Treaty (on equal pay for men and women) was considered to have direct effect in relation to direct and overt discrimination, but not in respect of indirect and disguised discrimination. So, perhaps it would not be so absurd to recognise direct effect for Article 7A - in so far as it relates, for instance, to systematic border controls, which clearly violate the objective of establishing "an area without internal frontiers".

After all, even Schockweiler himself raised the possibility of the Court of Justice, after 1 January 1993, broadening its doctrine on the equivalence of national measures.[60] This doctrine already applies to goods (on rules protecting health) and to services (on rules on imperatives of general interest).

c) The obligation should leave no margin of discretion

I suggest that, at least as far as the absence of border controls is concerned, the establishment of a single market "without internal frontiers" leaves no discretion to the Community authorities. They may not decide that there should be more or fewer controls at the internal frontiers. They just have to abolish them all. If this is so, then direct effect could be attributed to Article 7A in that respect, even if direct effect would not be recognised with regard to other aspects of the internal market. Article 7A would thus have partial direct effect. The idea of partial direct effect of a Community rule was implicitly accepted by the European Court in the Salgoil case.[61] There, the Court, when examining the obligations imposed by two provisions of the EEC Treaty, considered "whether the

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[56] Schockweiler, op.cit., p. 883.

[57] The "rule of reason" is a creation of the Court of Justice and regards the justification of national legislation obstructing free movement of goods between Member States. Consistent case-law of the Court establishes that such legislation is not prohibited by Article 30 of the EC Treaty (even when it is not justified under Article 36 of the EC Treaty) provided it is "necessary in order to satisfy mandatory requirements", or if it is objectively justified. See, e.g., case 120/78, Rewe-Zentral AG ("Cassis de Dijon"), [1979] ECR 649, paragraph 8.

[58] Case 28/67, Firma Molkerei-Zentrale Westfalen/ Lippe GmbH v. Hauptzollamt Paderborn [1968] ECR 143 at 152.

[59] Case 43/75, quoted supra, at 474.

[60] Schockweiler, op.cit., p. 885.

[61] Case 13/68 Spa. Salgoil v. Italian Ministry for Foreign Trade, [1968] ECR 453 at 461.

Member States may in performing them exercise any discretion such as to exclude the above mentioned [direct] effects wholly or in part".[62]

Moreover, a sort of institutional argument against the direct effect of Article 7A must be considered. Let us imagine that the expiration of the agreed date would entail automatically the abolition of all barriers to movement between the Member States. This could seriously harm the good functioning of the European decision making process. Indirectly, it could even harm the well-being of the Communities. The reason is that most of the Community instruments required to establish the internal market are measures on the harmonisation or coordination of divergent national rules - for example those on the protection of workers, general health or the environment. Here, a hypothetical direct effect of the internal market would entail, in each Member State, an automatic recognition of the other Member States' rules.

Member States with less protective rules in a certain field would not have to bargain with the others. They would not need to negotiate, to make concessions, or to try to find a compromise to reach a consensus for adoption of harmonisation measures for the whole Community. They would need to do nothing. Blocking the decision process, they would simply wait for the blessed date. After this, they could benefit both from free entry to the other countries and from lower standards at home. Consequently, the most protective countries would lose out and the level of protection in the Community would have a tendency to decrease.[63]

However, this argument may not fully apply in the border controls field. If direct effect is recognised only for the abolition of frontier controls and formalities, this argument may not be as important as it would at first seem. This is so simply because controls within the territory of the Member States would still be allowed, namely in fields where harmonisation measures were not taken. Therefore a less protective Member State could not wait for 1 January 1993 to have free access (for instance) to introduce its products to the other countries.

Meanwhile, it should be noted that at least one concrete case has been taken to court, in which is at stake the eventual direct effect of Article 7A in relation to internal border controls on persons. A British immigrant welfare association, the JCWI, lodged a complaint with a British court about an incident in which some of its members were stopped and examined when returning from another Member State, in May 1993.[64] They refused to show their passports alleging that under Article 7A of the EC Treaty no more passport checks should be carried out on people travelling between Member States. After being retained for about 40 minutes, they were allowed to enter. They sought a judicial review of the decision of the British Home Secretary to maintain immigration controls for persons moving between other Member States and the United Kingdom. They sought also

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[62] Idem, at p.461.

[63] This fear resulted in Article 100A (3).

[64] The main defendant in the case is Don Flynn, European Projects Worker of the Joint Council for the Welfare of Immigrants. The Standing Conference on Racial Equality in Europe (SCORE) has also been involved in the judicial procedures. See the JCWI, Annual Report 1992/3, pg. 8.

for damages for unlawful detention. On 9 March 1995, the (British) High Court decided against them, ruling that Article 7A obliged the Community,

> "to do no more than to adopt measures with the aim of establishing the internal market by 31 December 1992. It did not ordain the internal market would come into being on 1 January 1993."[65]

Furthermore, the High Court refused the defendants' request that the case be referred to the EC's Court of Justice, under Article 177 of the EC Treaty. The High Court considered that there was no doubt that the EC's Court of Justice would take a decision no different to that of the British High Court. On 7 July, an appeal against the decision of the High Court was turned down by the British Court of Appeal. A petition was meanwhile made to the House of Lords to refer the matter to the EC's Court of Justice.

Another case has already been decided, but was only concerned with free movement of persons in a more general manner. In INPS v. Baglieri[66] the Court had to decide whether or not Member States had the duty to admit the voluntary inscription to their social security systems of persons who were subject to mandatory social security contributions affiliation in another Member State, when these persons would eventually go back to their Member States of origin. The Italian nationals concerned had invoked Article 7A for that purpose. The Court ruled that Article 7A of the EC Treaty should not be interpreted so that, in the absence of the adoption of EC measures by the end of 1992, the expiry of that deadline would automatically entail the mentioned duty for the Member States. The Court agreed with the Advocate General in the opinion that such a duty presupposed the harmonisation of Member States legislation on social security, which did not exist in the current state of Community Law.[67] Nevertheless, what seems to have been at stake in this case is the request for a positive action, which differs from the absence of border controls, clearly a negative action.

f) Finally, it may be noted that the Commission has maintained an ambiguous position on the eventual direct effect of Article 7A, as far the abolition of internal border controls on persons is concerned. In the presentation of the Commission's working programme for 1995, its President, Jacques Santer, has expressly linked the abolition of internal controls with guarantees on security, and with combating drugs and organised crime.[68] This assertion, even if reasonable in itself, does not seem to strengthen the possibility of Article 7A having direct effect. However, formally, the Commission has maintained its long standing position that internal border controls violate Article 7A. The Commission has, for example, dissociated itself from the decision on "joint action" on travel facilities within the Union for third country nationals' school children. It stated that its reservations on the matter were meant

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[65] See R v. Secretary of State for the Home Department, *ex parte Flynn*, Queen's Bench Division of the High Court, March 9, 1995, LEXIS transcript. See also the Financial Times, 10/3/1995; *MNS*, 8/1993, p.3, and of 8/1995, p.1; and the editorial comments "British immigration controls", *ELR*, Vol.20, 1995, No.4, pp.353-354.

[66] Case C-297/92, INPS v. Baglieri [1993] ECR I-5228.

[67] Idem, paragraphs 16 and 17.

[68] *MNS*, 3/1995.

"to avoid precluding the possibility of a future Community initiative to ensure that all persons legally resident can effectively benefit from freedom of movement in the meaning of Article 7A of the EC Treaty".[69]

This ambiguity continued in a rather curious manner in the Community's draft Directives for the elimination of internal border controls on persons, presented in July 1995.[70] According to the Commission, the main Directive eliminating border controls, "would provide a final confirmation that controls at internal borders have indeed been eliminated".[71] In the Preamble of this Directive it is stated that such confirmation is necessary "to fulfil the clear and unconditional obligation enshrined in Article 7A, and in the interest of legal certainty". On the other hand, the Commission states also that this Directive "would take effect only when the flanking measures were themselves in force", since those measures "are considered essential to maintaining a high level of security within the area without internal borders".[72]

The Commission seems to play a delicate double game. It does not wish to compromise irremediably the possibility of invoking the direct effect of Article 7A. In the meantime, it seeks to tranquillise the Member States' governments and ensure that the approval of the relevant measures (either in the Community framework or under Title VI of the Treaty on European Union) is not jeopardised either.

2 - Indirect Effect

The Court of Justice has already declared that when Community acts are not able of having direct effect, nevertheless, in certain cases, they must be taken into account by national courts when interpreting national legislation. This is usually called the "indirect effect" of Community acts.[73] This effect is based on the supremacy of Community Law and on the *effet utile* of the acts concerned.

In Grimaldi,[74] for example, the Court ruled that although a recommendation of the Commission was not capable of having direct effect, it should, in any case, be taken into consideration by national courts in cases submitted to them. That should be particularly the case when the recommendations may clarify the meaning of national legislation

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[69] See the Commission's reply to oral question H-92/95 made by a member of the European Parliament (MEP). The Union "joint action" was adopted by the Council on 30 November 1994, OJ L 327/1-3. See also the Commission's reply to a written question by Glyn Ford (also a MEP) on passport checks in relation to internal flights: reply to question E-2635/94 given on 9/2/95.

[70] See below, the subsection on action against institutional failure to act.

[71] See the introduction to the Commission draft Directives, proposed in COM (95) 347 final.

[72] See the introduction to all three draft Directives, namely COM (95) 347 final. Note, meanwhile, that no conditional clause for that effect is included among the Directive's provisions (only one of the recitals of the Preamble of the Directive proposed in COM (95) 347 reads as follows "[w]hereas the relevant accompanying measures have been introduced satisfactorily"). Therefore, one may be somehow deceived by the declarations of Commissioner Mario Monti, according to which there "is explicit provision that these Directives will not enter into force until the accompanying measures (...) have been definitively adopted and implemented". See the Note from the Commission Spokesman, in *Agence Europe - Documents*, No.1948, 5/8/1995.

[73] See, e.g., Hartley, T.C., *The Foundations of European Community Law*, 3rd ed., Oxford, Clarendon Press, 1994, pp. 222-225, at 222.

[74] Case C- 322/88, Grimaldi v. Fonds des Maladies Professionels [1989] ECR 4407.

adopted to implement them, or when the recommendations were meant to supplement binding EC measures.

However, the most extensive case-law on indirect effect concerns Directives.[75] In Von Colson,[76] for example, the Court of Justice ruled that, in the absence of direct effect of the provisions of a directive, the national court must:

> "interpret and apply the [national] legislation adopted for the implementation of the directive in conformity with the requirements of Community Law, in so far as it is given discretion to do so under national law."[77]

The Court of Justice based this ruling on the duty of Member States, established in Article 5 of the EC Treaty, to "take all appropriate measures", whether general or particular, to ensure fulfilment of their Community obligations. The Court of Justice considered that this obligation applies to all authorities of the Member States, including the national courts, within their jurisdiction.[78] This justification was repeated also in later cases. On the other hand, the last condition referred to in the Van Colson ruling (the prerequisite that the national court has discretion under its law to make the required interpretation) was not repeated in the following rulings of the Court on indirect effect of Directives.

In the Kolpinghuis Nijmegen case,[79] the Court added that the Von Colson ruling was valid even before the expiry of the period in which Member States have to implement the Directive. Moreover, in Marleasing[80] the Court of Justice applied the Von Colson ruling to the interpretation of a national law which had not been adopted to implement an EC Directive. Indeed the national law had been adopted before the Directive. The Court of Justice was asked how to solve a case in which the Spanish Civil Code was in contradiction with an EC Directive not implemented in Spain. The Court ruled that:

> "the national court asked to interpret national law is bound to do so in every way possible in the light of the text and the aim of the Directive to achieve the results envisaged by it."[81]

Therefore, the Court ruled that a provision of the Spanish Civil code had to be interpreted as not being applicable to the case since it contradicted the EC Directive not implemented in Spain.[82]

A more recent case is ground to sustain that a national law has to be interpreted not only in the light of Directives, but of all Community Law.[83] In the *van Munster* case, the Court ruled that

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[75] See Prechal, S., *Directives in European Community Law - a study of Directives and their enforcement in national courts*, Oxford, Clarendon Press, 1995.

[76] Case 14/83, Von Colson and Kamman v. Land Nordrhein-Westfallen [1984] ECR 1991.

[77] Idem, see paragraph 26 and the conclusions of the judgment.

[78] Ibidem, paragraph 26.

[79] Case 80/86, Officier van Justitie v. Kolpinghuis Nijmegen [1987] ECR 3969, paragraphs 15-6.

[80] Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA [1990] ECR I-4135.

[81] Idem, paragraph 8. Emphasis added.

[82] This case concerned only private parties, and therefore, it raises the question of horizontal direct effect. Hartley, op.cit., p.223; and Steiner, J., *Textbook on EC Law*, 4th ed., Blackstone, London, 1994, p.40.

[83] See Betlem, Gerrit, "The *Effet Utile* of Indirect Effect, *Habermann-Beltermann v. Arbeitrwohlfahrt*", annotation to case C-421/92, [1994] ECR I-1657, in *Maastricht Journal of European and Comparative Law*, Vol.2, 1995, No.1, pp.73-84, at pp.80-81. Betlem recalls that the requirement that a national law be interpreted in conformity with a EC Directive, is part of the principle that requires that any legal act be

"when applying domestic law, the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of Community law(...)".[84]

The Court added that:

"(...) for the purpose of applying a provision of domestic law, [in a case in which] a national court has to characterise a social security awarded under the statutory scheme of another Member State, it should interpret its own legislation in the light of the aims of Article 48 to 51 of the Treaty and, as far as is at all possible, prevent its interpretation from being such as to discourage a migrant worker from actually exercising his right to freedom of movement".[85]

This ruling seems to be relevant to assess whether or not the Court of Justice would recognise indirect effect of Article 7A, notably as far as the abolition of border controls on persons by the end of 1992 is concerned. Article 7A is also part of the EC Treaty and likewise concerns freedom of movement of persons. However, in any event, it should be recalled that the provisions referred to in the van Munster case (Articles 48 to 51) had previously been recognised direct effect.[86] In contrast, direct effect was not yet recognised to Article 7A.

To assess in general terms the possibility of invoking the indirect effect of Article 7A, it may be useful to recall Timmermans remarks in this respect. He argues that the objective of Article 7A of removing all internal border controls should be given due regard when interpreting other EC Treaty provisions.[87] In his opinion, at the very least, that objective should be taken into account when interpreting the basic prohibitions on free movement of goods, persons, services and capital, as well as their exception clauses. This would mean, for example, that identity controls on persons, allowed under secondary Community Law,

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interpreted according to Community Law. Betlem, op.cit. p.81. It was also the same underlying principle that was in question when the Court ruled that "where it is necessary to interpret a provision of secondary Community law, preference should be given to the interpretation that renders the provision consistent with the Treaty and the general principles of Community law". See, e.g., case C-314/89 Rauh [1991] ECR I-1647, paragraph 17, quoted by Betlem, idem, p.83.

[84] Case C-165/91, van Munster [1994] ECR I-4661, paragraph 34. Emphasis added.

[85] Idem, paragraph 35.

[86] To be more accurate, the Court of Justice has conferred direct effect on Treaty provisions on free movement of persons - such as Articles 48, 52, 53, 59 and 62. See Lasok & Bridge, op.cit., p. 297; and Schermers & Waelbroeck, op.cit., pp. 146-147. The latter authors recall that the Watson case is ground to sustain that in general terms Articles 48-66 and the measures adopted by the Community in application thereof have direct effect, idem, at p.146, footnote 637. See case C-118/75, quoted supra. Note, however, as far as freedom to provide transport services is concerned, the limits shown in case 13/83, Parliament v. Council and case C-17/90, Pinaud Wieger, analysed infra.

[87] He believes that this is so even "according to the most orthodox interpretation methods developed in the Court's case-law", see Timmermans, in "Free Movement of Persons and the Divisions of Powers Between ...", op. cit., at p.357-8. See also Jessurun D'Oliveira, H.U., "Is Reverse Discrimination Still Permissible Under the Single European Act?", in *Forty Years On: The Evolution of Postwar Private International Law in Europe*, Deventer, Centrum voor Buitenlands Recht en Internationaal Privaatrecht / Kluwer, 1990, pp.84.

"instead of being a token of liberalisation as was the situation before the [Single European Act], now have to be regarded as restrictions to free movement to be abolished before the key date of 1 January 1993."[88]

Timmermans considers also another possibility. The interpretation, in the light of Article 7A, of the basic Treaty provisions on free movement of persons could lead to the conclusion that, from the end of 1993, controls of persons on internal borders should be simply considered as restrictions of free movement prohibited by Articles 48, 52, 59 and 60. In his opinion, that would be "a fairly radical solution". He sustains that this interpretation would not be much different than to recognise direct effect of Article 7A. This is a quite interesting idea, since it has often been argued that there is not much difference between the results of direct and indirect effect.[89]

However, Timmermans proposes a "much less controversial approach". He suggests that, having regard to Article 7A, the Court of Justice applies the necessity and proportionality tests much more strictly when it reviews national measures restricting free movement, which are allegedly justified by imperative public interests.[90]

Timmermans' remarks seem to elucidate both the potentialities and the limits of the indirect effect that could eventually be recognised for Article 7A. The consideration of this provision (and, thus, of its objective) could certainly make more severe the scrutiny of the conformity with the Community Law of national rules on controls of persons at internal borders. In this respect, it is not without relevance that, to a certain extent, such scrutiny was already performed by the Court of Justice before the end of 1992. National courts could, eventually, be required to interpret national legislation on border controls in a restrictive manner. This could be required of national courts inasmuch as they have margin for doing so - having regard both to the national legal system in general terms, and to the specific legal rules in question.

However, it seems highly improbable that the Court of Justice decides that indirect effect of Article 7A would make national courts disregard completely national laws providing for border controls on persons. This assessment derives from two type of considerations. First, from considerations of a judicial policy character. The political sensitivity of the abolition of border controls on persons would tend to render such

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[88] Idem, loc.cit.

[89] Hartley, sustains that the principle of indirect effect "provides a back door route by which something approaching the same result [of direct effect] can be attained under the guise of interpretation". See Hartley, op.cit., p.222. Van Gerven sustains that since 1986, when in the Marshall I case (case 152/84 Marshall v. Southampton and South-West Hampshire Health Authority [1986] ECR 723) the Court denied horizontal direct effect to directives, the principle of indirect effect has functioned as a surrogate for horizontal direct effect. See van Gerven, W., "The horizontal effect of directive provisions revisited: The reality of catchwords", in *Institutional Dynamics of European Integration - Essays in Honour of Henry Schermers*, Vol. II, Heukels, T. & Curtin, D. (eds.), Dordrecht, Martinus Nijhoff, 1994, p.335, at 346. Note also that, as Betlem points out, "in some of the most forceful rulings on direct effect", the Court has used in the operative part the very same language ("Community law precludes...") as it did in Marleasing, dealing with indirect effect. See, e.g., cases C-19 &20/90 Karella and others [1991] ECR I-2691, paragraph 36; and C-208/90 Emmott [1991] ECR I-4269, paragraph 24, quoted by Betlem, op.cit., p.83.

[90] Timmermans, in "Free Movement of Persons and the Divisions of Powers Between ...", op. cit., pp.357-8.

request by the EC's Court of Justice unlikely. Secondly, from considerations of a more legal nature. Article 7A is a provision of the EC Treaty which interpretation and effect is not officially determined, unlike the Directives which were granted indirect effect. Furthermore, it is rare that national courts be given much discretion to interpret national laws on border controls. This relates to an aspect of the case-law on indirect effect of Directives. It has been established that national courts have the duty to interpret national laws "as far as possible" in the light of the wording and purposes of a Directive. However, it is doubtful whether national courts can be required by the Court of Justice to make such an interpretation, when national law is not "reasonably capable of the meaning contended for".[91] When the national law is clearly incompatible with a Community Directive it is highly problematic to oblige national courts to "interpret" it in the light of the Directive, so as to not apply the national law.[92] Such interpretation could simply be not "at all possible". This seems to be specially the case when the national laws in question were not adopted with the aim of implementing the Directive in question. The general appropriateness of the Court of Justice to order national courts to make such an interpretation can be questioned. Moreover, it is doubtful that national courts would accept such an instruction.

To a certain extent, similar remarks can be made regarding an eventual indirect effect of Article 7A, particularly as far as the abolition of internal border controls is concerned. National courts may resist instructions of the Court of Justice that they interpret national laws clearly providing for border controls,[93] in such a manner that these laws be in conformity with the objective of Article 7A of ... abolishing border controls.

As a conclusion, the case-law on indirect effect of Community acts shows us another possibility for the Court of Justice to provide some effect to Article 7A, if it should decide to do so. However, it seems unlikely that the indirect effect of Article 7A could be used to give a substantive contribution to the complete abolition of internal border controls on persons.

3 - Action Against Failure to Act

If direct or indirect effect is not recognised to Article 7A, or if it is not recognised as far as the whole internal market is concerned, the only hope would be to take procedures based on Articles 175 or 215 of the EEC Treaty. These refer to procedures

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[91] Steiner, op.cit., p.40.

[92] In this way, Hartley wonders whether the Marleasing ruling would mean that the result envisaged by the Directive had to be attained, "irrespective of whether or not there could be any doubt as to the meaning of the national provision and irrespective of whether or not the words of that provision could reasonably bear the meaning required by the directive". If the answer to this question was positive, "the effect would be that, while pretending to uphold the Marshall principle, the European Court was in fact making directives directly effective against individuals". Moreover, the Court would be overstepping its competence, since it is for national courts to interpret national law. However, he adds, this may not have been the case as, apparently, the Spanish law under examination in the case was not clear on its meaning. Thus the national court would have had room to interpret the national law in conformity with the Community Directive. See Hartley, op.cit., p. 223-4. See also Weatherill, S. & Beaumont, P., *EC Law*, London, Penguin, 1993, pp.303-4.

[93] And, for example, providing for criminal sanctions for its disrespect.

against the failure to act of a Community institution and to the non-contractual liability of the Community. I will first examine the possibility of establishing the existence of a failure to act, as the Community liability would be related with that failure.

The proceedings of Article 175, on failure to act, are less useful than those based on preliminary rulings and direct effect, as private parties have limited access to them. Private parties may only complain that "an institution of the Community has failed to address to that person any act other than a recommendation or an opinion".[94] According to the interpretation of the Court of Justice, the act has to be of direct and individual concern to the plaintiff. It cannot be an act of general regulatory character.[95] As a result, this type of procedure would not be very helpful for individual complaints on barriers to the internal market. However, the procedure could be used by a Member State or by an institution of the Community against the Council or the Commission.[96]

A special two-step procedure is envisaged. First, the institution concerned has to be called upon to act. In the case of the Council, this would also require that proposals had been presented by the Commission. If the Commission had not presented such proposals there would be a failure to act on the part of the Commission, not of the Council - as the latter can only act on a proposal from the Commission.[97] In any case, the institution concerned has to be called on to act and has two months after that to "define its position". It may act or decide not to act. If it decides not to act, the (legal technical) failure to act would only exist if this constitutes an infringement of the Treaty. There is a relevant failure to act only if the Treaty prescribes a certain action to the institution, which it does not perform.

Thus far all the required conditions seem either to have been, or to be amenable of being easily fulfilled, as far as the lack of complete establishment of an internal market is concerned. The duty to act established by Article 7A on the Community institutions is quite clear. The literature on Community Law is unanimous in considering that at least Article 7A imposes on the Community institutions a duty to act to establish an internal market.[98]

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[94] Article 175(3) of the EC Treaty.

[95] See Steiner, op.cit., p.375-8.

[96] In case 13/83, European Parliament v. Council, [1985] ECR, 1513, paragraph 17, the Court of Justice confirmed that the European Parliament is included among the EC institutions authorised to bring an action against failure to act of another EC institution.

[97] See, e.g., Article 100, 100C, 189B, and 235.

[98] On this point see, for example Ehlermann, op. cit., p. 372; Glaesner, op. cit., p.313 and Jacqué, J. Paul, if "manifestement l'objectif ne serait pas atteint", "L'Acte Unique Européen", *RTDE*, Vol.22, 1986, n.4, pp.575-612 at 599. With the same opinion see De Ruyt, op.cit., at p.159, on the condition that "de manière flagrante, l'objectif n'a pas été atteint". Schermers sustains that "The obligation to complete the internal market before 1 January 1993 is sufficiently well-defined for disregard of it to be the subject of a finding of a failure to act pursuant to Article 175 [of the EC Treaty]." See Schermers, op.cit., at pp.279-280. Schockweiler considers that an eventual "constatation de la carence, revêtira essentiellement un caractère politique et morale. Toutefois, on ne saurait exclure qu'à l'expiration d'un délai raisonnable la Cour puisse elle-même déduire des effets directs des nouvelles dispositions du traité CEE, à l'instar de ce qu'elle a laissé sous-entendre dans l'arrêt sur la politique commune en matière de transports." See op.cit., p. 885. Schockweiler refers to case 13/83, quoted supra. However, it is generally considered that the Court in this case declined to speculate on the consequences of a failure of the Council to comply with the Court's injunction for it to act. See, e.g., Weatherill & Beaumont, op.cit., p.240.

Meanwhile, it is useful to recall a well-known case. In May 1985, in a case begun by the Parliament in September 1982, the Council was considered to have infringed the EEC Treaty by its lack of adoption of certain measures in the field of transport. The Parliament complained that the Council had not approved measures implementing a common transport policy, as provided for in the EEC Treaty. The Court examined the kind of measures the Council was supposed to have approved. The objective was to determine whether their subject-matter and nature could be determined with a sufficient degree of precision "for disregard of them to be subject of a finding of failure to act pursuant to Article 175".[99]

The issue involved the interpretation of several articles of the EEC Treaty. They will be briefly reviewed. Article 59 provides that:

> "Within the framework set out below, restrictions on freedom to provide services in the Community shall be progressively abolished during the transitional period(...)"

Article 61(1) states that:

> "Freedom to provide services in the field of transport shall be governed by the Title relating to transport."

Article 74, the first of the Titles on transport, establishes that:

> "The objectives of this Treaty shall, in matters governed by this Title, be pursued by the Member States within the framework of a common transport policy."

Article 75 contains comes more to the detail, saying that:

> " 1. For the purpose of implementing Article 74, and taking into account the distinctive features of transport, the Council shall (...) lay down (...)
>
> a) common rules applicable to international transport to and from the territory of a Member State or passing across the territory of one or more Member States;
>
> b) the conditions under which non-resident carriers may operate transport services within a Member State;
>
> c) any other appropriate provisions.
>
> 2. The provisions referred to in (a) and (b) of paragraph 1 shall be laid down during the transitional period."

In the case, the Court considered that:

> "the absence of a common policy which the Treaty requires to be brought into being does not in itself constitute a failure to act sufficiently specific in nature to form the subject of an action under Article 175."[100]

The Council's argument that it had a discretion in that field, was, "in principle", accepted by the Court. It recognised that it is for the Council to determine "the aims and means for implementing a common transport policy", "what priorities are to be observed" or "to decide what matters [the] harmonisation must cover".[101] Nevertheless, the Court ruled that Article 175 "takes no account of how difficult it may be for the institution in question

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[99] Case 13/83, quoted supra, paragraphs 66 and 68.
[100] Idem, paragraph 34-36.
[101] Ibidem, paragraphs 53, 49 and 50.

to comply with the obligation".[102] Therefore, the Court found the Council had failed to act "in so far as the obligations laid down in Article 75(1) (a) and (b) relate to freedom to provide services". In this respect they were considered to be sufficiently well defined for the Council's failure to act to be an infringement of the Treaty, as defined in Article 175.[103] Finally, the Council was given a *reasonable period* in which to act.

How can this ruling be of use for the search here undertaken? Can it help us to try to predict a possible decision of the European Court on a procedure for the failure to implement the internal market? The point is: could it be claimed that the acts required by Article 7A have a sufficient degree of precision in their "subject-matter and nature"? Could that character be claimed in so far as the obligations laid down in Article 7A relate to the complete free movement across borders, with no controls or formalities?

In this context, is also worthy to refer to the Pinaud Wieger case.[104] This case resulted from the lack of establishment by the Council of complete freedom to provide services, in spite of the ruling of the Court in the case discussed above. The proceedings were initiated by a private party who asked for a preliminary ruling of the Court. The case was not an action against failure to act of the Council, and, consequently, it should be appreciated bearing that fact in mind. Nevertheless, the Court addressed the problem of the Council's failure to act. The Court ruled that :

> "In the view of the complexity of the cabotage sector, considerable difficulties still stand in the way of the achievement of freedom to provide services in that sphere. This can be done in an orderly fashion only in the context of a common transport policy which takes into consideration the economic, social and ecological problems and ensures equality in the conditions of competition.
> (...) That being so, the Council was entitled to undertake the liberalisation of cabotage operations in a gradual manner."[105]

Would the Court apply similar reasoning in a case on the completion of freedom of movement of persons and the abolition of internal border controls on persons? Would the Court invoke the "complexity" of the area at stake and the due consideration to be given, for instance, to problems of "social" nature? Would the Court be sensitive to the argument that such freedom requires the creation of *compensatory measures* to be attained in an "orderly manner"? More importantly, what would be the margin of manoeuvre the Court would give to the Commission or the Council?

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[102] Ibidem, paragraph 48.

[103] Ibidem, paragraph 66 and 68. According to Lasok & Bridge, this was the "only successful action to date under Article 175". See Lasok & Bridge, op.cit., p.269. They were probably referring only to action against the Council.

[104] Case C-17/90, Pinaud Wieger GmbH Spedition v. Bundesanstalt für den Güterfernverkehr, [1991] ECR I - 5253.

[105] Idem, paragraphs 11 and 12 of the judgment, emphasis added. The Court also pointed out that the Council did adopt on 21/12/1989 Regulation 4059/89, laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State, OJ L 390/3, of 30/12/1989. This Regulation entered into force on 1 July 1990. In its Article 9 the Council undertook to adopt a Regulation laying down the definitive cabotage system by 1 January 1993. This Regulation, was adopted after the preliminary ruling request in this very case, but before the Court's judgment on the case, which dates from 1 November 1991.

These questions took on special practical importance with the case brought by the European Parliament against the Commission.[106] For a long time the Parliament had been complaining about the behaviour of the Commission, sustaining that it was not doing enough for true free movement of persons to be achieved. The absence of Commission proposals for the abolition of border controls on persons was one of the main points of controversy.[107] Therefore, in July 1993, the Parliament decided to initiate proceedings against the Commission in that respect.[108] The formal letter of the President of the Parliament was sent to the Commission on 20 July 1993, asking it to act within two months. The Commission replied to the Parliament in 23 September 1993 denying its failure to act contrary to the Treaty. Therefore, on 18 November 1993 the European Parliament took the case to Court. The case is an action against the failure to act of the Commission. The Parliament complains that the Commission contravened the EC Treaty by not present proposals for the adoption of the necessary legal measures to enable the achievement of freedom of movement of persons, as required by an internal market, according to the second paragraph of Article 7A inserted by the Single European Act.[109]

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[106] Case C-445/93, Parliament v. Commission, still pending - summary of the Parliament's application in OJ C 1/12 of 4/1/94.

[107] On 7 December 1988, the Commission stated that in this field it would rely mainly on the intergovernmental cooperation, and not on the normal law-making process of the European Communities. It explained that, being aware of the sensitivity of the issue, it considered that it should concentrate its attention "on the practical results, rather than on questions of doctrine". Therefore, while declaring that it was not abandoning its interpretation of the Treaty, the Commission stated that it would propose the adoption of Community Law measures in this domain only in the cases "in which the legal certainty and the uniformity of the community law will be a better instrument to attain that objective". The Commission reserved the possibility of launching Community initiatives in the case that intergovernmental attempts fail or would not produce sufficient results. See the Commission's Report on the abolition of identity controls at the internal borders of the Community, COM (88) 640 final, of 7/12/1988, p.6. Both the statement on priorities and on the intergovernmental cooperation set the tone for the subsequent attitude of the Commission, at least until the entry into force of the Treaty on European Union.

[108] See Agence Europe of 14, 15 and 16 July 1993, Nos. 6021 to 6023 (n.s.), respectively. On the problems raised by the action of the Parliament against the Commission on its failure to act regarding the completion of the free movement of persons, see O'Keeffe, David "Non-Accession to the Schengen Convention: The cases of the United Kingdom and Ireland", in *Schengen en Panne*, Pauly, Alexis (ed.), Maastricht, EIPA, 1994, pp.145-153, at pp.150-1.

[109] It has been suggested that an action against failure to act could also be envisaged regarding the Commission failure to bring enforcement actions under Article 169 against Member States. This provision is to be used against Member State's failures to fulfil an obligation under the EC Treaty. Arguably, these failures could concern the continuation of Member State's controls at internal borders. See Timmermans, "Free Movement of Persons and the Divisions of Powers Between ...", op. cit., at p.363. However, the Court has ruled that Article 169 does not oblige the Commission to bring proceedings against Member States. It is within the Commission's discretion not to do so. Therefore, an action against failure to act in this respect is inadmissible. See case 247/87, Star Fruit Company v. Commission [1989] ECR 291, paragraph 11; and case C-87/89, Sonito and others v. Commission [1990] ECR I-1981, paragraph 6. See also Kapteyn & Verloren van Themaat, op.cit., p.289; Schermers & Waelbroeck, op.cit., pp.309 and 316; Weatherill & Beaumont, op.cit., p.172 and p.237. See, however, O'Keeffe, who suggests that such possibility of action against failure to act could be seen at a different light provided the plaintiffs were other EC institutions, and not private parties as in the cases submitted to the Court up to now. See O'Keeffe, "Non-Accession to the Schengen Convention...", op.cit., pp.150-1. The point in discussion here is relevant in general terms because the Commission has not taken action against Member States' failure to fulfil their Treaty obligations under Article 7A, notably on account of their continuation of internal

The Court will have an opportunity to decide what is the best interpretation of that provision.

Yet, it is interesting that, meanwhile, from a legal perspective the situation may have entered into a grey zone.

First, in November 1993, almost one year after the expiry of the deadline for the establishment of the internal market, the Treaty on European Union entered into force. The free movement of persons is among the objectives of Title VI of that Treaty.[110] Under this Title, the Commission presented in December 1993 a number of proposals to facilitate a complete free movement of persons within Member States, notably the draft External Frontiers Convention.[111]

Secondly, on 12 July 1995, the Commission presented three draft directives aimed at abolishing internal border controls on persons.[112] These proposals are analysed in further detail in chapter 4. Here it is sufficient to recall their most more important aspects, and to refer to their consequences for the action brought by Parliament against the Commission.

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border controls on persons. The Commission has declared that it "has shelved the complaints it received in 1993 about checks on individuals at internal borders after 31 December 1992, (...) since the objectives laid down in Article 7a can be attained only if the necessary support measures are introduced." The Commission added that, as far as these measures are concerned, it had proposed the draft Convention on external borders, and the by now approved Regulations on a uniform format for visas (OJ L 164/1, of 14/7/1995) and determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ L 234/1, of 3/190/1995). See the Twelfth Annual Report on Monitoring the Application of Community Law (1994), COM (95) 500 final, of 7/6/1995, point 2.4.2, OJ C 254/1 at 29, of 29/9/1995.

[110] For an analysis of the relation between the Community competence and Title VI of the Treaty on European Union, see infra chapter 7.

[111] Commission Communication on a Proposal for a decision, based on Article K.3 of the Treaty on European Union establishing the Convention on the crossing of the external frontiers of the Member States, presented together with a Proposal for a Regulation, based on Article 100C of the Treaty establishing the European Community, determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, COM (93) 684 of 10/12/1993. As mentioned before, this last Regulation was already adopted by the Council. Furthermore, in July 1994, the Commission presented a draft Regulation laying down a uniform format for visas, COM (94) 287 final, of 13/7/1994. This was also adopted, as Council Regulation (EC) No.2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, OJ L 234/1, of 3/10/1995. Thus, among these three Commission's proposals, only the External Frontiers Convention has not yet been adopted. See section A of chapter 8 for an analysis of these instruments.

[112] Draft Council Directive on the elimination of controls on persons crossing internal frontiers, COM (95) 347, final; Draft Council Directive on the right of third-country nationals to travel in the Community, COM (95) 346, final; and Draft European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, COM (95) 348 final. All three draft Directives are dated from 12/7/1995.

A framework draft Directive[113] provides for the general elimination of controls on persons crossing internal frontiers. It establishes that:

> "All persons, whatever their nationality, shall be able to cross Member State' frontiers within the Community at any point, without such crossing being subject to any frontier control or formality."[114]

It is provided also that this general rule "does not affect the exercise of the law-enforcement powers" of national authorities over their territory. It does not affect either legal "obligations to possess and carry documents".[115] Furthermore, the draft Directive allows the temporary reinstatement of controls, in case of "a serious threat to public policy or public security".[116] Yet, these controls "shall not exceed what is strictly necessary to respond to the serious threat".[117]

This framework draft Directive, on the general elimination of internal border controls on persons, is complemented by two other draft Directives. One amends some rules of secondary Community Law, which did allow for the possibility that Member States control persons at internal borders.[118] Another draft Directive provides a key element for the abolition of internal border controls. It grants third country nationals, "who are lawfully in a Member State", the right to travel in the territories of other Member States.[119] This right is granted both to third country nationals holding a residence permit issued by a Member State[120] and to those who do not hold such a permit.[121] The right to "travel" of third country nationals is defined as being:

> "the right to cross internal Community borders and to remain in the territory of a Member State for a short stay, or to travel onward, without the person concerned being required to obtain a visa from the Member State or States in whose territory the right is exercised"[122]

This right does not affect rules on stays other than for a short time, and on access to employment and the taking-up of activities as a self-employed person.[123]

The presentation by the Commission of these three draft Directives for the abolition of internal border controls on persons may be relevant for the action of the

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[113] Proposed in COM (95) 347 final.

[114] Article 1(1). Article 3(4) defines that, for the purposes of the Directive, frontier control means "any control applied, in connection with or on the occasion of the crossing of an internal frontier, by the public authorities of a Member State or by other persons, under the national legislation of a Member State". Frontier formality signifies "any formality imposed on a person in connection with the crossing of an internal frontier and to be fulfilled on the occasion of such crossing".

[115] Idem, Article 1(2).

[116] Article 2 (1) and (2).

[117] Article 2(3).

[118] Draft Directive proposed in COM (95) 348 final.

[119] Article 1(1) of the Draft Directive proposed in COM (95) 346 final.

[120] Idem, Article 3 and Article 2(2).

[121] These will enjoy the right to travel in other Member States in two type of situations. First, if they hold a visa which is valid throughout the Community and which is "mutually recognised for the purpose of crossing the external frontiers of the Member States" - Article 4 and Article 2(3). Secondly, in case they are not required a visa to enter the other Member State concerned.

[122] Article 2(1).

[123] Article 1(3).

Parliament against the Commission's failure to act in this respect. It seems that the Commission's proposals pursue a double objective.

One is actually to contribute to the abolition of such controls, particularly as there has not been much progress in the negotiations of the draft External Frontiers Convention. However, the Commission states that the elimination of controls "would take effect only when the flanking measures were themselves in force", since those measures "are considered essential to maintaining a high level of security within the area without internal borders".[124] This is a rather curious statement. It may certainly be related with the fact that unanimity in the Council is required for the adoption of the proposals, as they were presented under Article 100. The Commission did not want to go against Member States concerns on security. Why, then, does it not present the draft Directives after the adoption of such "flanking measures"? This relates with the other objective of the Commission.

The second likely objective of the Commission concerns the latter's wish to defend itself from the Parliament's action on failure to act. In its judgment on this action the Court could eventually find that the Commission failed to present proposals to abolish internal border controls on persons by the end of 1992. However, at the present moment the Commission has already presented several proposals for such abolition - these comprising the proposals presented under Title VI of the Treaty on European Union and the three mentioned draft EC Directives. It can be argued that they propose the minimum indispensable measures to eliminate internal border controls on persons.[125] Thus, it is less likely than before that the Court will find that the Commission failed to act.

This is explained by a characteristic of the action on failure to act. The objective of this action is to make the Court establish an infringement of the Treaty by the Council or the Commission on account of their failure to act. The defendant institution is then required to take the necessary measures to comply with the Court's judgment. The point is that the Court of Justice has held that, when the institution adopts a measure after the action was brought, but before the case is decided, the Court will not give judgment, since the subject matter of the action has ceased to exist.[126] In the pending case Parliament v. Commission the Court would have to decide whether or not the Commission has, by the

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[124] See the introduction to all three draft Directives. As mentioned before, no conditional clause is included in the Directive for that purpose. In the introduction to the three draft Directives the Commission declares what are the compensatory measures to which entry into force the Commission refers. Such compensatory measures are the three proposals presented by the Commission (External Frontiers Convention, Regulation on a uniform format of visas, and Regulation on the list of countries whose nationals have to hold a visa to enter a Member State) as well as the Dublin Convention (determining the State responsible for examining applications for asylum lodged in one of the Member States) and the draft Convention on a European information System. The later draft Convention is still being negotiated under the Title VI of the Treaty on European Union. The Dublin Convention has not yet been ratified by all Member States.

[125] Naturally, the draft External Frontiers Convention requires several implementing measures yet to be negotiated, not to mention to be formally adopted and implemented. Likewise, the Convention on the European Information System is quite important for the abolition of internal border controls on persons. Nevertheless, it could be argued that the Commission has presented proposals for the main measures required for such abolition. It is harder now than it was before to say that the Commission did not yet make a minimum institutional effort to push forward such abolition.

[126] See case 377/87, European Parliament v. Council [1988] ECR 4017, paragraph 10; and case 383/87, Commission v. Council [1988] ECR 4 [1988] ECR 4051, paragraph 10.

time the case will be decided, fully complied with the duty to present proposals to establish an internal market - as far as abolition of internal border controls on persons is concerned.

At the present moment, further progress for that abolition depends mainly on the negotiations in course within the Council, and not so much on the presentation of additional proposals by the Commission. To the extent that the Commission has presented relevant proposals, an action against failure to act would be of interest if presented against the Council, not against the Commission anymore.

Furthermore, and in any case, in a ruling on failure of the EC institutions to act to bring about full free movement of persons, the Court could repeat some considerations of the kind it made in the cases analysed above, concerning the transport sector. That is to say: even if the Court admits that the Commission or the Council should have done more, it may also consider that the problems at stake are of such a nature that a quick solution could not be demanded.[127] In the end, even if the Commission or the Council are found to have failed to act in some degree, the Court's ruling may not be strong enough to push forward the complete abolition of internal border controls on persons.

On the other hand, it should also be said that an action against failure to act of the Commission or the Council seems likely to be more successful than an action asking for the direct or even indirect effect of Article 7A. By simply declaring that the Commission or the Council should have done (something) more to abolish internal border controls on persons, the Court would contribute to that objective. A moral victory for the European Parliament would be better than plain defeat. Moreover, as mentioned before, it is also conceivable that the Court qualifies its ruling so that the failure to act of the EC institutions could be considered partially justified under the circumstances. A careful and balanced judgment could eventually attain two objectives simultaneously. It could uphold in general terms the objective of Article 7A, but not uphold strongly the abolition of border controls. In perhaps the best of hypothesis, it could contribute to that abolition, while avoiding the negative effects of what, in the present political context, could be seen as an interventionist decision.[128]

In any case, too much speculation is fruitless. It is better to wait for the judgment of the Court.

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[127] Note that the previous relevant case-law of the Court, and thus the general uncertainty on the outcome of an action against the Commission's failure to act, led some members of the European Parliament to admit that judicial procedures were perhaps not the best way of ensuring the completion of the internal market. See *Agence Europe* of 2 April 1993, No.5953 (n.s.).

[128] See, e.g., *Agence Europe* of 8 December 1992, No.5874(n.s.), on critics of the German government, both at the federal and state level (of Bavaria). The German minister for social affairs is quoted as having said that "the Court has to defend the law and not to impose it". He added that "European judges all too often exceed their role, notably where social legislation is concerned." The critical opinion of the governments of the Member States in relation to the European Court of Justice is also somewhat reflected, for example, in the fact that the Court was not given competence on measures dealing with "Justice and Home Affairs", adopted under the framework of the cooperation procedure of Title VI of the Treaty on the European Union. See chapter 7 for a discussion on the role of the Court of Justice of the European Communities, with full reference to the literature on the subject.

4 - Non-Contractual Liability of the Community[129]

For the sake of completeness, I will now examine whether the Community could be held liable for damages caused by the failure of its institutions to establish an internal market, as far as the abolition of internal border controls on persons is concerned.

Article 215(2) of the EC Treaty establishes that:

> "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."[130]

An action on this basis would have the advantage of being open to private parties, in contrast with the simple action for failure to act of a Community institution. Under Article 175(3) of the EC Treaty, an action against failure to act can only be initiated by a private party, when "an institution of the Community has failed to address to that person any act other than a recommendation or an opinion". As mentioned above, the Court of Justice has interpreted this rule restrictively, considering that the act in question has to be of direct and individual concern to the plaintiff, not an act of general regulatory character. This type of restriction does not exist as far as action for non-contractual liability of the Community is concerned. The Court has ruled that action on this basis is an independent form of action, being admissible even if another type of action is not. It may be noted that Article 176(2) of the EC Treaty provides that, when the Court finds a violation of an obligation to act, such finding does not affect any obligation resulting from non-contractual liability of the Community, as defined by Article 215(2).

According to the case-law of the Court of Justice on the matter,[131] there are three cumulative requirements for non-contractual liability of the Community to be found. First, there must exist a wrongful act or omission on the part of a Community institution, or its

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[129] On the non-contractual liability of the Community see Fines, F., *Étude de la responsabilité extracontractuelle de la Communauté Économique Européenne: de la référence aux principes généraux communs à l'édification jurisprudentiel d'un système autonome*, Paris, LGDJ, 1990; Hartley, op.cit., pp.467-482; Lasok & Bridge, op.cit., pp.48-56; Schermers, H., Heukels, T., & Mead, P. (eds.) *Non-Contractual Liability of the European Communities*, Dordrecht, Martinus Nijhoff, 1988; Steiner, op.cit., pp.388-402; and Weatherill & Beaumont, op.cit., pp.269-273. See also van Gerven, W., "Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe", in *Maastricht Journal of European and Comparative Law*, Vol.1, 1994, No.1, pp.6-40.

[130] According to Article 43 of the Protocol on the Statute of the Court of Justice of the European Communities, actions "against the Community in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto". The Court has held that the limitation period of five years does not begin before all requirements for liability, particularly damage, have materialised. The same Article 43 provides also for interruption of the maximum period of five years if proceedings are instituted before the Court or an application is made to the relevant Community institution.

[131] See, e.g., case 26/81, Oleifici Mediterranei Sa v. EEC [1982] ECR 3057, paragraph 16. See also Steiner, op.cit., p.389, Lasok & Bridge, op.cit., p.50; and Weatherill & Beaumont, op.cit., p.270.

servants.[132] Secondly, there must be a damage to the plaintiff. Thirdly, there must exist a causal connection between the conduct of the Community and the damage in question.

As far as the first requirement is concerned, it includes also the wrongful failure of an EC institution to adopt a binding act when the institution had a duty to do so.[133] It was argued above that Article 7A of the EC Treaty established a duty of the Community institutions to adopt measures to abolish internal border controls on persons by the end of 1992.[134] Provided that the existence of this duty is recognised, the lack of action of the Community institutions would amount to a wrongful failure to act, which in principle would be capable of engaging the Community into non-contractual liability.[135]

However, this issue should be examined with due care, as far as non-contractual liability is concerned. The objective here is to assess properly whether the Community could be held liable for not having abolished internal border controls on persons by the end of 1992. For this purpose it is useful to refer to some case-law on non-contractual liability. When, for example, what is at stake is a legislative measure involving choices of economic policy,[136] the Court has consistently held that the Community is not liable unless it has seriously breached a superior rule of law for the protection of the individual.[137]

First, in this context a legislative measure can be any binding act which purports to lay down general rules.[138]

Secondly, as far as a superior rule of law is concerned, it can correspond to a Treaty provision, or to any general principle of law developed by the Court.[139] The

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[132] Although it is not strictly required by Article 215(2), the Court requests proof of fault in the conduct of the Community institution which has caused damages. See, Lasok & Bridge, op.cit., p.49; and Hartley, op.cit., 479.

[133] Steiner, op.cit., p.390. A mere power to act is not enough ground for liability, Hartley, op.cit., p.480.

[134] Action on non-contractual liability of the Community could eventually be also justified on another ground. This would be the failure of the Commission to bring enforcement actions under Article 169 against Member States who after 1992 performed border controls on persons contrary to Article 7A. The possibility of action against the Commission's failure to act was suggested by O'Keeffe & Timmermans, as referred to supra. Yet, as mentioned supra, up to now the Court has refused such possibility in cases where the plaintiffs were private persons. In any event, Schermers & Waelbroeck explain how existing case-law of the Court supports the possibility of asking for damages for the Commission's failure to exercise adequate control of Member States' conduct. In joined cases 5,7,13-24/66 Kampffmeyer (the first case) [1967] ECR 278, an illegal act had been committed by the German government and expressly approved by the Commission. The Court of Justice accepted the existence of a causal link between the damage suffered and the approval by the Commission of the illegal act of the German government. See Schermers & Waelbroeck, op.cit., p.364. However, it should perhaps be recalled that action against the Commission (on account of its failure to bring infringements against Member States' violation of Article 7A), would presuppose that this provision had direct effect, or, at least, some sort of indirect effect.

[135] See Hartley, op.cit., p.480; and Lasok & Bridge, p.51. As the adoption of Community legislation in this field depends basically on the Commission and the Council, a plaintiff could name as defendants one or the other institution, or even both of them - depending on their responsibility in the precise situation of the case. See Hartley, op.cit., p.470.

[136] See also Schermers & Waelbroeck, who sustain that the "failure to adopt a legislative act involving choice of economic policy may, under certain circumstances, also give raise to damages." They recall in this respect case 56-60/74, Kampffmeyer (the fifth case) [1976] ECR 744, paragraph 15. See Schermers & Waelbroeck, op.cit., p.346.

[137] This is usually called the "Schöppenstedt formula", adopted in case 5/71, Schöppenstedt v. Council [1971] ECR 975, paragraph 11.

[138] Steiner, op.cit., p.392.

principle of protection of legitimate expectations is one of these general principles.[140] The Court has ruled that the principle of legitimate expectation forms part of the Community legal order, and thus any failure to comply with it is a violation of the EC Treaty or "any rule of law related to its application, within the meaning of Article 173".[141] A legitimate expectation is "one which might be held by a reasonable person as to matters likely to occur in the normal course of his [or her] affairs".[142] The violation of this principle has already been the basis of Court decisions annulling Community acts, or deciding that their interpretation had to respect the principle.[143] Furthermore, this principle has already been successfully argued in claims for damages.[144]

A rather interesting case in this respect is the CNTA case.[145] It concerned a system of monetary compensatory amounts to make up for losses arising from fluctuations in exchange rates. This system was established in 1971 for the trade of colza and rape. However, the Commission abolished the system as from 1 February 1972. The CNTA, an enterprise involved in the colza business, complained that it had suffered loss as a result of the sudden and unexpected abolition of the scheme. No provision had been established to regulate transactions entered into during the time the system was in force. The Court held that:

> "In the absence of an overriding matter of public interest, the Commission has violated a superior rule of law, thus rendering the Community liable, by failing to include in the Regulation [which abolished the system of monetary compensatory amounts] transitional measures for the protection of confidence which a trader might legitimately have in the Community rules".[146]

This case concerned a legislative measure, but the violation of the principle of legitimate expectations was declared to be the result of an omission of the Commission: its failure to include appropriate transitional measures to protect the legitimate expectations of the relevant traders. Thus, this case can be a ground to argue for liability of the Community in the case of damages caused by its failure to abolish internal border controls on persons.[147]

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[139] Weatherill & Beaumont, op.cit., p.270. See also Steiner, op.cit. p.392.

[140] On the principle of legitimate expectations (and legal certainty) in Community Law see Hartley, op.cit., at pp.149-155; Schermers & Waelbroeck, op.cit., pp.52-69, in particular at pp.65-68; Schwarze, J., *European Administrative Law*, London, Sweet & Maxwell, 1992, pp. 942-953; Wyatt, D. & Dashwood, A. et al., *European Community Law*, 3rd. ed., London, Sweet & Maxwell, 1993, pp. 91-5. Schermers explored also the possibilities of using the principle of legitimate expectations, by recalling the case-law of the Court of Justice, in "The effect of the date ...", op.cit., at pp.280-285.

[141] See, e.g., case 112/77, Töpfer (II) [1978] ECR 1019, paragraphs 18 and 19.

[142] Steiner, op.cit, p.67.

[143] See, e.g., as far as annulment is concerned, case 81/72, Commission v. Council (Staff Salaries case) [1973] ECR 575; and case 120/86, Mulder v. Minister van Landbouw en Visserij [1988] ECR 2321; and, as far as an interpretation which respects the principle is concerned, case 78/74 Deuka etc v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel [1975] ECR 421. See Lasok & Bridge, op.cit., p.165.

[144] See, e.g., case C-152/88, Sofrimport SARL v. Commission [1990] ECR I-2477.

[145] Case 74/74, CNTA v. Commission [1975] ECR 533.

[146] Idem, paragraph 44.

[147] See also Schermers, who sustains that "[f]or years, the Community as well as the Member States have announced that there would be a single internal market before 1 January 1993. Traders could legitimately expect that barriers would be lifted before that date and one could maintain that the Community will be liable if, in the absence of any overriding matter of public interest, internal barriers are maintained." See Schermers, in "The effect of the date ...", op.cit., p.282. Schermers refers also to case 127/80, Grogan

Such damages could, for example, be incurred by a transport enterprise which, by the end of 1992, had made investments counting on the abolition of internal border controls by that date. Such an enterprise could argue that it had acted "according to the letter and the spirit of the law in confidence that his fidelity to the law [would] be reciprocated".[148]

However, the ruling of the Court in the CNTA case embodies also what can turn out to be an important limitation for a claim for damages based on lack of respect of legitimate expectations. The qualified ruling of the Court, above quoted, would allow it to deny damages, by upholding a claim by a (defendant) Community institution that there was an overriding public interest in maintaining internal border controls on persons after 1992. Such interest could allegedly correspond to the need of safeguarding public safety, or the need to control the traffic of drugs or illegal immigration - particularly while adequate compensatory measures on the abolition of internal border controls were not yet adopted.[149] The permanence of internal border controls on persons has indeed often been justified in this manner.[150]

The third condition to establish the existence of a wrongful conduct of a institution is that the breach of the superior rule of law (such as the principle of legitimate expectations) has been a "sufficiently serious breach". The Court demands that the Community institution concerned has "manifestly and gravely disregarded the limits on the

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[1975] ECR 549 (paragraphs 41-44); and case 66/84, Ferriere di Borgaro, [1985] ECR 927 (paragraphs 21-2). He sustain that the Grogan case is ground to argue that after having for a number of years mentioned the date of 1/1/1993 for the establishment of the internal market, "the Community may not be entitled to change the situation it created without compensating those who have made investments based on that date". The Ferriere di Borgaro case would be basis to argue that a "possible failure of the Community to announce in good time that there will not be one internal market by 31 December 1992 could make it impossible to producers to plan their production correctly, which may cause damages." He adds that "[e]ven accepting that the producers ought to be able to predict a delay the Community nonetheless may bear responsibility for such damages." See Schermers, idem, pp.282-285. On the last aspect, on the relevance of the behaviour of the plaintiffs who suffer the damages, see infra in the main text.

[148] Lasok & Bridge, op.cit., p.166.

[149] This ground could also be invoked as far as action for failure to act is concerned, as referred supra, in relation to the case Pinaud Wieger, quoted supra. There the Court ruled that the Council was allowed to adopt measures to ensure free movement of services in a gradual manner, because "[t]his can be done in an orderly fashion only in the context of a common transport policy which takes into consideration the economic, social and ecological problems and ensures equality in the conditions of competition." Case Pinaud Wieger, quoted supra, paragraph 11. Note also that, as mentioned supra, the Court of Justice created a "rule of reason", by which it accepts the compatibility with Article 30 of the EC Treaty of national legislation obstructing free movement of goods, even when it is not justified under Article 36 of the EC Treaty, provided such legislation is "necessary in order to satisfy mandatory requirements". This is another example of the acceptance by the Court of exceptional motives for disregard of Community positive rules (at least on a strict interpretation of these rules).

[150] See, e.g., the summary of the conclusions of the report *1992: Border Control of People*, of the Select Committee for the European Communities of the House of Lords, Session 1988-1989, 22nd report, p.32; and the declarations of the Commission's president Santer on the presentation of the Commission's programme to the European Parliament, on 15 February 1995, see *MNS*, 3/1995.

exercise of its powers".[151] To assess the existence of such behaviour the Court has looked to the effect of the measure in question and to the nature of the breach, i.e. to the way and the extent to which the institution was *culpable*.[152] As far as the effect of the measure is concerned, the Court has ruled that, in order to award compensation for damages, it was relevant whether or not the damages were significant, and whether they were the result of a normal level of risk inherent in the economic activities in question (including, e.g., whether the institutional behaviour in discussion was unforeseeable[153]). As far as the nature of the breach is concerned, the Court considers whether the Community institution has failed completely to take into account the interests of the concerned traders, "without invoking any higher interest",[154] and whether institutional mistakes can be regarded as "verging on the arbitrary", or were a pure technical error. Again, these conditions are formulated in such an indeterminate manner that they can be invoked by the Court to refuse to award compensation for damages caused by the non abolition of internal border controls by the end of 1992.

Besides the existence of a wrongful act or omission of a Community institution, to find non-contractual liability of the Community there must be a damage to the plaintiff. Following its general trend as far as non-contractual liability is concerned, the Court has been rather restrictive in the definition of the damages that can be compensated.[155] The plaintiff must be able to prove the nature and extent of the injury. He or she has to prove that the damages are actual, certain and concrete. The economic losses have to be specific and not speculative. They must not have been passed on to other parties. More importantly, the plaintiff will receive compensation only if he or she showed reasonable diligence in limiting the extent of the damages.[156]

The final condition to establish non-contractual liability of the Community is the existence of a causal link between the damage of the plaintiff and the conduct of the Community institution. The damage must not be a remote consequence of the unlawful conduct of the Community institution concerned, but it has to be "a sufficiently direct

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[151] See cases 83/76 at al., Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG v. Council and Commission (Second Skimmed Milk Powder) [1978] ECR 1209 and case 238/78 Ireks-Arkady GmbH v Council and Commission [1979] ECR 2955.

[152] Steiner, op.cit., pp.393-6.

[153] See, e.g., case 59/83 Biovilac v. EEC [1984] ECR 4057. According to Schwarze, "[t]he expectation of the person in question, which must have a subjective basis, must also be recognisable to an outsider and therefore be capable of acquiring an objective dimension. " This would entail that the plaintiff "must not have acted in a such way as to preclude his reliance on the expectation". Furthermore, as Schwarze points out (recalling Advocate General Mayras in cases 44-51/77, Union Malt v. Commission [1978] ECR 57 at 90), the "frustration of the alleged legitimate expectation by the infringement of the acquired legal position or of the individual interest must not have been foreseeable by the person affected". He adds (recalling Advocate General Reischl in case 108/81 Amylum v. Council [1982] ECR 3107, at 3148) that only "if the persons in question, on the basis of 'all the essential factors known at the time', were entitled to assume that the rights or interests acquired by them would remain guaranteed, could there be said to exist a 'legitimate expectation worthy of protection' ". See Schwarze, op.cit., pp.951-2.

[154] Case C-104/89 & C-37/90, Mulder v. Council and Commission [1992] ECR I-3061.

[155] Steiner, op.cit., p.397.

[156] Case Mulder, quoted supra, paragraph 33.

consequence" of such conduct.[157] If the applicant is partly to blame for his or her loss, compensation for damages may be granted, but is reduced.[158] Likewise, the plaintiffs are expected to act as prudent persons. For example: the causal link between damages and a misleading information provided by a Community institution will only be recognised if the information would have caused an error in the mind of a reasonable person.[159]

It is quite clear that the case-law of the Court of Justice gives it a large margin of manoeuvre to refuse to award damages for the failure of the Community institutions to ensure, by the end of 1992, the abolition of internal border controls on persons.[160] It is certainly true that the EC Treaty provisions and the relevant case-law of the Court of Justice contain all the necessary principles to award damages on that basis. Such award could be justified in a manner compatible with previous case-law. However, the Court has submitted those general principles to a considerable number of exceptions and qualifications. These limitations would facilitate the Court's justification of a refusal to award damages for such failure to act.[161]

As mentioned above, the Court could accept that public safety was an "overriding public interest" justifying the failure to abolish internal border controls on persons. In the light of this "public interest", the nature of the breach of the institutions' duty to act could be considered not sufficiently serious for damages to be awarded. It would not be "verging on the arbitrary". Moreover, the defendant institution could sustain, and the Court could accept, that a prudent or reasonable person could have foreseen that internal border controls on persons would not have been abolished by the end of 1992. The Commission declarations that border controls would not be compatible with Community Law after 1992 could justify expectations that such would actually be the case.[162] But it could also be pointed out that contradictory statements were made on the matter by different Community institutions (and even Member States). Moreover, it could be said that before the end of 1992 the Commission presented no proposal for secondary EC legislation abolishing internal border controls on persons. It could be argued before the Court that this should have been enough to make a prudent person not count on the expectation that those controls would be completely abolished by that date. All these arguments go against the award of damages on the basis analysed. It seems rather unlikely that the Court would

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157 Cases 64 & 113/76 et al., P. Dumortier Frères SA v. Council [1979] ECR 3091. See also Lasok & Bridge, op.cit., p.51, who note that the failure to act of a EC institution has not only to constitute a breach of a duty to act, but has also to be the "direct cause of loss or damage".

158 In the Adams case, the compensation for damages caused by the Commission's breach of confidence was reduced to half of the calculated amount of losses, as Adams was considered to have contributed to such losses by not protecting adequately his interests. See case 145/83, Adams v. Commission (No.1) [1985] ECR 3539.

159 Case 169/73, Compagnie Continentale France v. Council [1975] ECR 117. See also Schermers & Waelbroeck, op.cit., p.364.

160 A part of the case-law analysed supra refers to unlawful acts, but it has also been applied, or could be easily applied to unlawful omissions.

161 It would be also possible that Community institutions would be found to have failed to act, but that damages would not be granted to a private plaintiff, due to the restrictive conditions for awarding damages due to non-contractual liability.

162 See supra, the Commission documents pointing in this direction, e.g., SEC (92) 877.

actually grant them. After all, it must not be forgotten that, in practical terms it is very rare that individuals obtain damages from the Community.[163]

As a conclusion, an eventual Court decision on this matter would depend less than usual on strict legal considerations and on the specificity of the actual situation in question. Given the relative indeterminacy of the relevant case-law,[164] a decision on this topic would depend more on how the situation would be legally framed. Ultimately, the Court's judgment would be more dependant than usual on the practical result searched for by the Court itself. It would be more open to considerations of judiciary policy and general politics, than to strict legal factors.[165]

C - LEGAL VALUE OF THE DECLARATIONS ANNEXED TO THE SINGLE EUROPEAN ACT

Finally I will refer to the discussion as to whether some of the Declarations put together in a "Final Act", annexed to the Single European Act, could entail a restrictive interpretation, if any at all, of the new Article 7A of the EEC Treaty.

Three of these Declarations are relevant for the purposes of the present search. Two of them were adopted by the Conference of the Representatives of the Governments of the Member States that signed the Single European Act. One is on Article 7A of the EEC Treaty. After reaffirming the conference's "firm political will to take before 1 January 1993 the decisions necessary to complete the internal market", it states, however, that:

> "Setting the date of 31 December 1992 does not create an automatic legal effect."

The other is a "General Declaration on Articles 13 to 19 of the Single European Act" and reads as follows :

> "Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques".

A third important "political declaration" was made on the free movement of persons by the representatives of the governments of the Member States. According to that declaration:

> "In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They

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[163] See Steiner, op.cit., p.382 and 391; and Weatherill & Beaumont, op.cit., pp.269-170. The latter authors recall the information given by the Commission's IVth General Report on the Activities of the European Communities (on the year 1990). In this report it is mentioned that, as of 31 December 1990, among the cases brought before the Court on Community non-contractual liability, only in 4 per cent of them (13 out of 329) had the Court found in favour of the applicant in respect of at least one of the applicant's main claims. See the Commission's report, at p. 449. Likewise, Schwarze confirms that "it is only very seldom that the principle of the protection of legitimate expectations has ultimately benefited the individual citizen". Schwarze, op.cit., p.950.

[164] Schwarze, op.cit., p.950.

[165] Schermers & Waelbroeck refer in general terms to the fact that "the decision on the non-contractual liability of the Communities will often entail passing judgment on Community policy", op.cit., p.329.

shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques."

The first declaration mentioned is a reaction to the Commission's initial proposal, which was quite clear on the force to be given to the mentioned date. That initial proposal stated that:

> "The Community internal market shall be progressively established during the period expiring on 31 December 1992".

If by such date the Community Institutions had not adopted provisions for its establishment, each Member State would simply have to recognise the equivalence of the rules of the other Member States concerning persons, goods, services and capital.[166]

The two other Declarations quoted recall both versions of Article 2 of the Commission's initial proposals. The first version,[167] of 16 September 1985, proposed that:

> "Without prejudice to specific provisions of the Treaty (...) unanimity shall be required, until 31 December 1992, for the adoption of measures concerning the entry, movement and residence of persons on the territory of the Member States".

The second version, of 5 October 1985, stated that:

> "Without prejudice to the powers of the Community, the Member States shall cooperate in conjunction with the Commission, with the aim of achieving the internal market in relation to persons, in particular as regards entry, movement and residence of nationals of non-Community States, and the combating of crime and of traffic in drugs."[168]

The assessment of the legal value of these Declarations is important for the interpretation of the contents and the legal effects of Article 7A. The literature on Community Law is not unanimous on that topic. Some claim that the declarations are legally binding between the Member States,[169] while others consider they have no binding legal force and cannot even affect the interpretation of the Single European Act by the European Court.[170] In order to determine their legal value, I will examine them (1) from the point of view of the relevant rules of Public International Law,[171] then (2) in the light of Community Law and finally (3) from the perspective of the national Law of the Member States.

1 - The Single European Act is, naturally, a treaty of international law, subject therefore to the rules of treaties. To examine the problem from the perspective of the relevant Public International Law rules, we may make recourse to the Vienna Convention of the Law on

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166 See Articles 2 and 4 of the first proposal of the Commission, published in the annex of Ehlermann's article, "The Internal Market ...", op. cit., at p. 405.

167 Idem, loc.cit..

168 Ibidem, p. 408. Emphasis added.

169 Schermers, Henry G., "The effect of the date...", op.cit., at 276.

170 Toth, A.G., in "The legal status of the Declarations annexed to the Single European Act", *CMLRev*, Vol.23, 1986, No. 4, pp.803-812 at 812.

171 On the issue, in general, see Horn, Frank, *Reservations and Interpretative Declarations to Multilateral Treaties*, Amsterdam, North-Holland, 1988, at pp.98 and 229.

Treaties.[172] Despite not having been ratified by all Member States,[173] the Convention is considered to be the expression of the rules of customary international law on the subject.[174] In its light, what is, then, the international legal status of the Declarations?

They are not an integral part of the Single European Act.[175] This, as an amendment to the EEC Treaty, had to be ratified by all Member States. In fact it was. However, the Final Act, which contains the Declarations, was not included in the instrument ratified by the Parliaments of some Member States - for instance in France, Belgium, Luxembourg and Netherlands. As a result, it cannot be considered an integral part of the Single European Act. Nor can the declarations of the "Final Act" be considered reservations within the meaning of Article 2(1)(d) of the Vienna Convention, as they are not unilateral statements. Furthermore it would not be very logical if the governments of the Member States agreed "on one thing in the main body of the treaty and then agree[d] on something else in an annexed text".[176] Thus, they could perhaps be considered simple interpretative declarations, meaning that they should be taken into account when interpreting the Single European Act.[177] This would be possible, for instance, if they could be considered part of the context of the treaty. In fact, Article 31 of the Vienna Convention on the Law of Treaties states that:

> "1. A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

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[172] Concluded on 23 May 1969, entered into force on 27 January 1980, UN Doc A/Conf. 39/27, 1969; UNTS, Vol.1115, p.331; or ILM, Vol.8, 1969, p.679.

[173] France, Ireland, Luxembourg and Portugal are not yet parties to the Convention. Among these four countries only Luxembourg signed the Convention.

[174] Bernhardt, Rudolf "Interpretation in International Law", in *Encyclopaedia of Public International Law*, Bernhardt, Rudolf (ed.), Amsterdam, North Holland, 1984, Vol.7, p.318 at 321. See also Schermers, "The effect of the date...", op.cit., at p.276, and Schermers & Waelbroeck, op.cit., p.102, note 463.

[175] This assertion does not raise controversy, even among those who would not agree with my conclusions. See, e.g., Schermers who states that "[s]trictly speaking the [first] declaration on Article 8A [Article 7A] is not part of the Single European Act. It was adopted at the time of signing of the Act, but it was not incorporated in the Act itself, nor was it signed by the representatives of the Member States or ratified by their Parliaments(...)", see "The effect of the date ...", op.cit. at 275-6. Actually, the Final Act was signed by the same national plenipotentiaries that signed the European Single Act itself.

[176] Toth, op.cit., pp. 803-805.

[177] Schermers goes a bit further and sustains that "[t]he Declaration on the date of 31 December 1992 must be seen as authentic interpretation of the use of that date in the Single European Act (...)", in "The effect of the date ...", op.cit. at p.276, emphasis added. In this respect, Bernhardt, Rudolf (op. cit. at 325) sustains that: "[t]he notion of 'authentic interpretation' is not a substantive rule of interpretation; rather, it denotes the result of an interpretation made by the competent decision-maker. Authentic interpretation means binding or legally conclusive interpretation which no longer can be challenged as erroneous." The point here is that the declarations were not made by the relevant "competent decision-maker", nor accepted by all of them. This is due to the fact that, in my view, the competent decision-maker should be understood to be the competent organ (or procedure) to ratify the European Single Act: i.e. national parliaments (or popular referenda). See infra.

a) any agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty;(...)"[178]

All three Declarations were agreed on by the representatives of the governments of all Member States, as well as being made in connection with the Single European Act. Therefore, in principle, they could be considered part of its context. In this respect I should say that I do not agree with Toth's argument that there is

"an absolute bar which prevents the European Court of Justice from taking any of the Declarations into account as part of the 'context' ".[179]

The bar he refers to would be Article 31 of the Single European Act. This article provides that the provisions of the original Community treaties "concerning the powers of the Court of Justice (...) and the exercise of those powers shall apply only to the provisions of Title II and to Article 32" of the same Single European Act. Because the said declarations were not incorporated in the Single European Act, they are not an integral part of it. Thus, they are not under the jurisdiction of the Court. According to Toth, this would mean that the Court of Justice could not interpret the Declarations, nor take them into consideration when interpreting the Single European Act.

I fail to see the relation between these two last assertions. What seems to be at stake is not the interpretation of the Declarations in themselves, but the interpretation of the main text of the Single European Act. At most, if the Declarations were interpreted, that would only be done to assess the sense of the provisions of the main text of the Single European Act. On the latter the European Court's jurisdiction is not discussed.

In my opinion there is a different obstacle to considering the Declarations as part of the context of the Single European Act. Article 31 of the Vienna Convention, above quoted, provides that, for the purpose of the interpretation of a treaty, its context shall include, inter alia:

"any agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty".

Therefore, for the Declarations to be considered part of the context of the treaty, *parties* would have to be understood here as being the mere representatives of the Member States; not the States themselves functioning throughout the national authorities with the constitutional powers to assume international obligations. These authorities are the national parliaments; or, in some cases, the people expressing itself by referendum.[180]

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[178] Emphasis added. This statement on what comprises the context of a treaty, and is therefore relevant for its interpretation, does not seem to tally exactly with Schermer's assessment of the issue, according to which, "for the purpose of its interpretation 'a treaty shall comprise, in addition to the text, any agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty' ". See Schermers, "The effect of the date...", op.cit., at p.276 (emphasis added). Besides, there are more elements to be taken into account in the context of the treaty, like its preamble, for example.

[179] Toth, op.cit., pp. 810-811.

[180] I believe that, in what concerns Article 31 of the Vienna Convention on the Law of Treaties, *parties* are the States who ratify an international treaty. The representatives of States' governments to the act of signature of a treaty are not to be identified with the respective States themselves. This is so as long as - as happened for the Single European Act - they do not have treaty making power themselves, this power being exercised by an act of ratification of the Parliaments, or by a people's referendum. Here, clearly the Parliaments or the peoples (indirectly) are the ones who have treaty making power. Therefore, in my view, a declaration of the governments' representatives (who do not have power to engage their States) is not an agreement made between the *parties* to that treaty. Otherwise, the representatives of a (government of) a

Here, only the Parliaments (or the people by referenda), may engage their States in international obligations. The fact that the Final Act was not ratified by all the Parliaments of the Member States, precludes the declarations from being considered as part of the context of the Single European Act, whatever their relevance as such could be.[181]

2 - Whatever is the value of the declarations in the light of Public international law of treaties, the Court of Justice of the European Communities has exclusive jurisdiction to assess their value in Community law terms. According to Article 219 of the EC Treaty, the Member States agreed to "not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."

As far as Community Law is concerned, first I will refer to the relation of such Declarations with the Single European Act; and then I will recall the Court of Justice's doctrine on the relevance of similar declarations to the scope and legal effects of Community instruments.

First it must be recalled that in all the founding treaties and Acts of Accession there is an express provision incorporating the annexes and protocols in the related

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State could, indirectly, engage their countries in international obligations without the consent of the national institutions having treaty making power. As long as the national institutions with treaty making power do not ratify themselves the declarations of their representatives, such declarations are not binding. This seems to have relevance both from the point of view of international Law of treaties, and that of the national constitutional Law of each Member State. Moreover, it may be recalled that Article 33 of the European Single Act establishes that the Act "will be ratified by the High Contracting Parties in accordance with their respective constitutional requirements". Furthermore, Article 14(a) of the Vienna Convention on the Law of Treaties confirms that such a provision of the European Single Act means that the consent of a State to be bound by the treaty is made through the ratification. Thus, we may concluded that the State is not bound by instruments which were not ratified by the national institution with treaty making power. This seems to be evident in the light of national Law, which is relevant for the purposes of Article 46 of the same Convention, thus excluding any commitment of the States undertaken against their own Law on competence to conclude treaties. Note also in this context the reference to the Antonissen case made infra, on the value of the declarations under Community Law.

[181] This seems to be confirmed by Whiteford's argument on the status of the two declarations made by the 11 Member States' governments to the Social Agreement adopted in the framework of the Treaty on European Union. The Final Act of the latter Treaty declares that the Protocol on Social Policy (to which is annexed the Social agreement, to which in turn are annexed the two declarations) will be annexed to the EC Treaty. Whiteford has argued that the declarations "would thus seem part of the Treaty signed by the government representatives which the national legislatures [were] asked to ratify". This would contrast to the remaining declarations which "are annexed to the Final Act of the Conference and not to the [EC] Treaty", and as such were not laid before the national parliaments for ratification. Thus, she suggest that there is a difference between the two type of declarations. This difference would mean that the declarations annexed to the Social Agreement "should with the Agreement, be treated as part of the Treaty". See Whiteford, Elaine A., "Social Policy After Maastricht", *ELR*, Vol.18, 1993, No.3, pp.202-222, at 210. I am not too certain that the intention of the drafters of the Final Act of the Treaty on European Union was that of annexing the declarations (annexed to the Social Agreement, in turn annexed to the Social Protocol) to the EC Treaty as such. In any case, Whiteford's argument is interesting in that it stresses the importance of the fact that national parliaments ratify declarations to a Treaty, for such declarations to have binding value.

treaty.[182] However, there is no such provision in the Single European Act. If the governments of the Member States had wanted to make clear the limits of the Single European Act rules, the Declarations should have been incorporated in the main Treaty.[183] The Court has already stressed the importance of the incorporation of annexes and protocols by a explicit provision, in order for them to be "equally binding " in relation to the main text of the ECSC Treaty.[184]

Furthermore, the Court of Justice's doctrine on the value of declarations on Community instruments has been rather disappointing for those who sustain the legal importance of such declarations. The Court has never contradicted the normal scope of a provision by using a declaration alone. It has used a declaration of the Council, but only to confirm the meaning of a Community act, which had already been interpreted by other methods.[185]

More recent cases only confirm the above. In 1991, for example, in the Antonissen case, the Court examined the value of a statement made by all members of the Council and entered in the Council minutes at the time of its adoption of Regulation 1612/68[186] and Directive 68/360/EEC[187]. Such declaration made a restrictive interpretation of certain rules of these instruments. The Court decided that :

> "(...)such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation, where, as in the case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance."[188]

Would the ruling of the Court have been similar if the provision at stake had been a primary source of Community Law?

3 - In any case, at the level of the national legal orders, the problem seems to find its definitive solution. The legal value of the Declarations is, at least, considerably weakened because they have not been ratified by all the Parliaments.[189] Accordingly, if they have any

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[182] Articles 84 of the ECSC Treaty, Article 239 of the EEC Treaty, 207 of the Euratom Treaty, Article 158 of the Act of Accession of Denmark, Ireland and United Kingdom, Article 150 of the Act of Accession of Greece and Article 400 of the Act of Accession of Portugal and Spain. See also the Final Act of the Treaty on European Union, which incorporates its protocols to the Treaties establishing the European Communities, or to the Treaty on European Union itself.

[183] Yet, it is unusual for such Declarations to be incorporated in a treaty.

[184] Case 7 & 9/54, Groupement des Industries Sidérurgiques Luxembourgoises v. High Authority, [1956] ECR 175.

[185] Case 136/76, Auer [1979] ECR 437, paragraphs 25 and 26.

[186] Regulation 1612/68/EEC of the Council on freedom of movement for workers within the Community, OJ L 257/2 of 19/10/68, later amended.

[187] Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers and members of their families, OJ L 257/13, of 19/10/68, later amended.

[188] Case C-292/89, Antonissen [1991] ECR I-745, paragraph 18, emphasis added. With the same reasoning see case 237/84, Commission v. Belgium, [1986] ECR 1247, paragraph 17. Note that the same type of question arises in relation to eventual declarations by Member States' governments to the (draft) Convention on External Borders, see infra, point 1-d) of section A of chapter 8.

[189] In the Member States where the Parliaments have the power to do so. Furthermore, in the Member States where the Final Act was not included in the due act of ratification, it was not officially published either, a further argument to deny the legal relevance of the Final Act and its declarations.

legal value at all, it can only be of secondary importance, at most.[190] The Declarations should be considered as having a political, rather than a legal value.[191]

Besides the problem of their legal relevance, the declarations could only be useful for the interpretation of the Single European Act in so far as they expressed the common intentions of those who approved it. However, to this effect, it would be necessary to find out the intentions of the Parliaments and the people who approved that treaty. This would be a formidable task, which, in any case, would probably not provide uniform conclusions. Furthermore, the problem is more acute if we consider that the Declarations themselves do not seem to be very clear. In the first Declaration, which stated that 1992 would have no "automatic legal effect", the governments of the Member States expressed their intention of not being taken to the letter. But then, what is the remaining legal effect of the mentioned date? Is it only a basis for procedures on the failure to act?

The other two Declarations do not seems to be very clear either.

The second declaration quoted deals with issues that require new measures to abolish the present controls on internal borders. Does the declaration mean that Member States only remain with competence beyond what is necessary to abolish all controls? Alternatively, does it mean they retain all their old competence, even over measures directly aimed at the abolition of controls? If this is so, why does Article 7A say "The Community shall adopt measures (...) in accordance with the provisions (...) of this Treaty"? Should it not, then, just provide that "the Community may adopt measures" or that "the governments of the Member States may, or shall, adopt measures"?

The third declaration envisages the cooperation of Member States on the free movement of persons, "without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries." The reference to the Community competence seems to show that the governments of the Member States did not consider intergovernmental cooperation as being possible over the whole field. Nor could this field be of Community competence only, as this would render the

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190 Cf. Schockweiler, op.cit, at p.884.

191 See, e.g., Kapteyn & Verloren van Themaat, according to whom the two last declarations examined "can be at best regarded as mere statements of political intent". The first declaration (on the lack of legal effect of the date of 31 December 1992) "would not prevent an action being brought for flagrant failure to achieve the objective of the establishment of the internal market by 1992". In Kapteyn & Verloren Van Themaat, *Introduction to the Law...*, op. cit. 2nd.ed., pg.102, footnote 190. On the other hand, Schermers sustains that (unless the declarations are in conflict with the S.E.A. itself) they "should be regarded as legally binding between the Member States", see "The effect of the date...", op.cit. at p.276. In the same direction seems to point the argument of the Council in the case Antonissen (case quoted supra, op.cit., at p.757), according to which a declaration of the members of the Council on a point dealt by Regulation 1612/68 and Directive 68/360/EEC constitutes a compromise which is only effective between those who produced it. The problem is that, according to an established view and a consistent doctrine of the Court of Justice, the EC Treaty differs from the classical type of the treaties between States, as it confers rights directly to individuals. Therefore the declarations may well be of some relevance between the governments of the Member States (as a kind of soft law), e.g., in what concerns the compromise to cooperate in the areas they mention. However the same declarations can never diminish the rights and duties of individuals, EC institutions, and Member States, in so far as those rights and duties have their basis in the new rules introduced by the Single European Act.

declaration useless. Could it be that third country nationals were seen as an issue to be dealt with at both Community and intergovernmental level; while measures on "combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques" were to be object of intergovernmental cooperation only? Did the governments mean to draw a line between them? However, in that case, why does the second Declaration not make any clear distinction between the two groups?

The conclusion of this whole exercise is that these Declarations do not seem to be able to help us too much in the interpretation of the Single European Act. They only leave clear the idea that somehow the governments of the Member States wanted to limit the scope and effects of the Single European Act provisions.[192] Yet, was not the Single European Act, however, presented to national Parliaments as representing the possibility of finally having an internal market with no frontiers?

It is suggested that the declarations have no legal value, or at least not a value of an overriding nature, for them to have a decisive influence on the Court's interpretation of Article 7A. What is certain is that the main text of the Single European Act was approved by all Member States as it was drafted. Consequently, in order to find the precise meaning of Article 7A, we would do better to concentrate on other means of interpretation.[193] The Court of Justice should be considered free to do the same.

CONCLUSION

In the last section we saw why, from a legal point of view, the declarations annexed to the European Single Act cannot have a definitive influence on the Court's decision on the meaning and legal effects of Article 7A.

Therefore, the interpretation of that provision can follow the suggestions presented in section A. In a market "without internal frontiers", there should be a complete abolition of controls on persons at ... internal frontiers. These controls should cease to be applied to all persons, whether economically active or not, whether nationals of a Member State or not. This would be coherent with the objective of Article 7A to abolish obstacles to movement of persons, services, capital and goods in a similar manner. Furthermore, this would be the only way of making full use of Article 7A. It is not possible to control exclusively third country nationals at the Community internal borders. Otherwise, the objective of Article 7A in this respect would be deprived of any practical effectiveness. Therefore, it was argued that, after 1992, and at least in the absence of special

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192 In this respect Weiler, J.H.H. recalls that "(...) the attempt to exclude some matters from the Community process and discipline might turn out to be a self-fulfilling wish", "Neither Unity nor Three Pillars - The Trinity Structure of the European Union", in *The Maastricht Treaty on European Union - Legal Complexity and Political Dynamic*, Monar, Joerg et al. (eds.), Brussels, European Interuniversity Press, 1993, p.49, at 51. The lack of progress on the activity of the Community on dismantling internal border controls of persons demonstrates the validity of Weiler's assertion. The latter will only be mitigated if any of the judicial procedures examined supra manage to force the Member States to adopt measures at the Community level in fields where they otherwise would be reluctant to intervene.

193 As I tried to do in the previous section.

justifications of a temporary nature, controls on persons at the Community internal frontiers violate Article 7A of the EC Treaty.

Concentrating on this violation, Section B examined the legal effects of Article 7A, considering the legal remedies available in case of its infringement. Some arguments were presented in favour of direct effect of Article 7A. It was argued that that provision could have at least partial direct effect, precisely as far as abolition of internal border controls on persons is concerned. However, it seems politically unlikely that the Court would recognise direct effect of Article 7A in that respect. It also seems unlikely that an eventual recognition of the indirect effect of that provision would be able to make a substantive contribution to the abolition of those controls. Another remedy analysed was action against the EC institutions failure to act to establish an internal market. It is arguable that Article 7A establishes a legal duty on the Community to adopt measures to that effect, for example in so far as that is necessary for the abolition of internal border controls on persons. The possibility to invoke failure to act by the EC institutions was examined particularly with reference to the action the European Parliament initiated against the Commission for the latter not having "put forward the necessary proposals to facilitate achieving freedom of movement for persons".[194] Finally, reference was also made to the possible liability of the Community for violation of Article 7A. It was seen how unlikely it was that a private plaintiff be awarded damages caused by the failure of the EC institutions to adopt measures to establish a complete internal market.

As a summary, we cannot place much faith in the possibility that, whatever their legal value, any of the remedies explored above will push the internal market into practice, in so far as the complete abolition of internal border controls of persons is concerned. Even what seems to be the available remedy most likely to succeed (action on the failure of EC institutions to act to abolish controls) cannot be fully trusted as a means to achieve such abolition of controls. It seems that the action of the Parliament against the Commission, for example, will face important legal and political obstacles.

On the legal side, the prudence of the Court of Justice in the ruling on the failure of the Council to act in the area of transport policy is notable. Besides, one has to keep in mind that free movement of persons is included in the objectives of Title VI of the TEU. The Commission has already presented under that Title proposals to facilitate a complete free movement of persons within Member States, such as the draft External Frontiers Convention. Moreover, in July 1995, the Commission presented three draft Directives for the elimination of border controls on persons at internal borders. In any case, it may take a considerable time before a Court decision is reached, and such decision may well turn out to be only a general declaration, giving more time to the Commission to act. Finally, inasmuch as the Commission has presented relevant proposals, an action on failure to act would be of greatest interest if brought against the Council, rather than the Commission.

To some extent, it is the Community legal system itself that is organised in a way that allows for such institutional failure to act. The system is weak as far as action against the EC institutions failure to legislate is concerned. However, in my view, it is not so much that the Community system is imperfect, but rather that it was deliberately drawn up

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194 Case C-445/93, Parliament v. Commission, quoted supra.

to work in that way.[195] It is not easy to force a legislator to act by judicial means. This is also true for the Community in its role as legislator. In this regard we might note the fate of Article 138 of EC Treaty, on a uniform procedure for all Member States for elections to the European Parliament.[196] Unanimity may have some advantages, but is often the path to deadlock.

On the political side, it could be said that we are facing a problem in which all legal considerations are ultimately pushed aside by political factors. A case on the full implementation of the internal market may turn out to be one of the most sensitive decisions required from the EC's Court of Justice. The issue at stake is of extraordinary importance and any ruling against the Commission (and later eventually against the Council) would have huge political and, in general, practical repercussions. We cannot expect the European judges to be immune to the criticism the Court has been receiving and to the impact that a more interventionist ruling might have in the present troubled phase of European integration. In a future Court's ruling, some legal arguments may ultimately be used solely to disguise the political motivations for that ruling. Any decision of the Court will certainly be carefully weighted and worded.

In any case, it should be remembered that the practical importance of the abolition of internal border controls can be obfuscated by the way in which it will be put into practice. The current trend in the organisation of the abolition of internal border controls presents a real danger that police controls, previously carried out at the borders, will be substituted by more intrusive controls performed inside the territory of the Member States. These controls may include, or do already include: the excessive reinforcement of controls at the external frontiers; the introduction of identification cards and their obligatory holding, as well as the register of foreigners when entering a Member State; and spot checks inside the territory, which often discriminate on grounds of race. The situation may ultimately reach such a point that it may not be absurd to wonder whether it would have been better to keep old border controls.

In the near future the Court of Justice will rule on the correct interpretation and the legal effects of Article 7A of the EEC Treaty. It is even possible that the Court will

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[195] Like Rebecca, the animated cartoon character of Spielberg's movie "Who framed Roger Rabbit", who said "I am not a bad girl, I was just drawn like this".

[196] Note the case C-41/92, The Liberal Democrats V. European Parliament [1993] ECR 3174. On 14 February 1992 the British Liberal Democratic Party presented in the Court of Justice a case against the Parliament on this topic. It complained of the Parliament's failure to fulfil its obligations under Article 138(3) of the Treaty of Rome to adopt proposals for a uniform electoral system for European elections. On 10 June 1993 the Court rejected the application since, meanwhile, on 10 March 1993, the Parliament had adopted resolution A3/381/92 to that effect. However, Advocate General Darmon, while proposing that rejection, upheld the argument that the Treaty must be also applied with regard to the electoral system at European elections and that the institutions are required to act to this purpose. He opened the way for future judicial action against the Council. According to Article 138(3) this institution is now responsible for laying down the appropriate provisions on the matter, "which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements". See also *Agence Europe* of 29/6/1993, No.6011(n.s.).

make a balanced judgment and thus contribute somehow to the completion of the internal market, as far as the abolition of internal border controls on persons is concerned. However, a Court decision reacting strongly against the EC institutions failure to act is not likely. European integration is a gradual process, in which limited progress is achieved at a slow pace, inseparable from political ambiguity. Therefore, for now, we would be better off accepting that, in the world of politics, Law is a tool of minor importance.

Chapter 4

COMMUNITY RULES ON FREE MOVEMENT

CONCERNING
THIRD COUNTRY NATIONALS

INTRODUCTION

The traditional and simplistic idea that third country nationals are outside the scope of Community Law has been gradually eroded both by the work of the EC institutions and by the legal literature. As far as substantive Community Law is concerned,[1] the two main areas of discussion have been the situation of third country nationals who are relatives of a migrant national of a Member State, and the Agreements concluded with third countries containing rules on their nationals working in the Union.

In this chapter, Community rules on third country nationals will be examined from the point of view of Community Law alone. The next chapter will examine Community Law as resulting from external agreements. Sections A and B of this chapter will analyse the rules on third country nationals relating to the freedom of movement within the European Union. Section C of this chapter examines the personal scope of other Community legislation applicable to third country nationals.

Section A of this chapter examines the rights granted to third country nationals in their very capacity. I will review the rules of free movement, in order to ascertain whether, and to what extent, third country nationals are able to benefit from them.

I will start with what is arguably nowadays a moot point: whether third country nationals should be included in the personal scope of Article 48, i.e., whether they should be considered as beneficiaries of the free movement of workers. This is an important point,

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[1] For a long time the leading Article on the legal status of third country nationals in Community Law was the one of Oliver, Peter, "Non-Community Nationals and the Treaty of Rome", *YEL*, Vol.5, 1985, pp.57-92. See also Duyssens, Daniel "Migrant Workers from Third Countries in the European Community", *CMLRev*, Vol.14, 1977, No.3, pp.501-520; Falchi, G. "Le regime definitif de la libre circulation et l'immigration des pays tiers", *Droit Social*, 1971, No.1, p.16; Greenwood, Christopher "Nationality and the Limits of the Free Movement of Persons in Community Law", *YEL*, Vol.7, 1987, pp.185-210, particularly at pp.205-210; Maresceau, M. "La libre circulation des personnes et les ressortissants d'États tiers", in *Relations extérieures de la Communauté Européenne et marché intérieur: aspects juridiques et fonctionnels*, Demaret, P. (ed.), Bruges, College of Europe, 1986 / Brussels, Story Scientia, 1988, pp.109-136; Plender, Richard, *International Migration Law*, 2nd.ed., Dordrecht, Martinus Nijhoff, 1988, pp.193-225; Stein, Torsten & Thomsen, Sabine "The Status of the Member States' Nationals under the Law of the European Communities", in *The Legal Position of Aliens in National and International Law*, Vol.2, Frowein, J.A. & Stein, Torsten (eds.), Berlin, Springer-Verlag, 1987, pp.1775-1826; Sundberg-Weitman, Brita, *Discrimination on Grounds of Nationality - Free movement of workers and freedom of establishment under the EEC Treaty*, Amsterdam, North-Holland, 1977. For more recent bibliography, see Evans, Andrew "Third Country Nationals and the Treaty on European Union", *EJIL*, Vol.5, 1994, No.2, p.199; Hoogenboom, Thomas & D'Oliveira, Hans Ulrich "The Position of Those Who Are Not Nationals of a Community Member State" in *Human Rights and the European Community: Methods of Protection*, vol. II of *European Union - The Human Rights Challenge*, Cassese, A., Clapham, A. & Weiler, J. (eds.) Baden-Baden, Nomos, 1991; Lanfranchi, M.-P. *L'Entrée et la circulation des travaillers migrants ressortissants d'etats tiers dans la Communauté Européenne*, PhD Law thesis, Marseille, Université de droit, d'economie et de sciences politiques d'Aix-Marseille, 1992, and her *Droit Communautaire et Travailleurs Migrants des États Tiers - Entrée et Circulation dans la Communauté Européenne*, Paris, Economica, 1994; Reischle, Matthias *The Legal Status of Non-EU Nationals residing in the European Union from a Community Law perspective*, Bruges, College of Europe, April 1994, (Paper for the Master's Degree); and Stangos, Petros N. "Les ressortissants d'états tiers au sein de l'ordre juridique communautaire", *CDE*, Vol.28, 1992, No.3-4, pp.306-347.

as it will help us to assess the significance of the legal arguments in the decisions taken on the matter, as well as in the political discourse on the issue.[2] It will place those decisions in their proper context. Then, the particular situation of refugees will be examined, as far as the EC right of free movement of workers is concerned. Finally, in the context of EC rules on the free movement of workers, I will analyse the so-called principle of "Community preference" in the access to the labour market of Member States.

I will then examine the EC rules on freedom of establishment, free movement of services, capital and goods. The analysis of the provisions on the free movement of services will include the examination of the issues raised by the situation of third country nationals working for an EC enterprise which provides services in a Member State other than that in which it is established. Finally, I will refer to the Commission proposals on the right of third country nationals to travel within the Community.

Section B of this chapter examines the rights granted to third country nationals deriving from a family relationship with a migrant national of a Member State, where the latter benefits from freedom of movement within the Community. It will be emphasised that these rights are subordinate rights, granted only so as to allow those third country nationals to accompany a migrant national of a Member State, who actually exercises his or her right to free movement. The issue of reverse discrimination, raised by this situation, will be examined. Then, particular attention will be paid to two points. Firstly, an overview of the mentioned relatives' rights will be provided. Secondly, a careful examination will be made of the right of residence of a third country national who is the spouse of a migrant national of a Member State - particularly in the event of the divorce of the couple and when the couple is not married. The extent to which Community Law on the matter conforms with the rules of the European Convention on Human Rights will be questioned.

Section C will examine the personal scope of Community legislation on social policy (excluding free movement of persons) and on education, to determine whether and to what extent such legislation can also be applied to third country nationals. A brief reference will also be made to other Community rules applicable to third country nationals, namely on officials of the institutions of the European Union and on procedural rights.

In the concluding remarks a global analysis will be made of the rules of free movement, as far as third country nationals are concerned. I will try to highlight the inconsistencies and contradictions of the Community legal regime, and to question the extent to which they are related to the attempt to resist according to third country nationals resident in the Union the full benefits of the free movement rules. I will, therefore, question whether from the perspective of the coherence of the system, as well as from a practical point of view, it is worthwhile continuing to basically exclude third country nationals from the benefits of free movement of persons.

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[2] And, indirectly, also on the Community competence in the matter.

A) RIGHTS ASSIGNED TO THIRD COUNTRY NATIONALS IRRESPECTIVE OF ANY FAMILY RELATIONSHIP WITH A NATIONAL OF A MEMBER STATE

This section will analyse the rights enjoyed by third country nationals under Community Law on free movement themselves, independently of any family relationship with a migrant national of a Member State. This section will not examine the rights granted to third country nationals as a result of being relatives of migrant nationals of a Member State. Such rights will be analysed in section B of this chapter.[3]

1 - Rights in the Framework of the Free Movement of Workers

a) The law as it stands

(i) Contrast between rights of Member States' nationals and rights of third country nationals residing in the Union

The rights enjoyed by third country nationals under EC Law on free movement of persons contrast sharply with those enjoyed by nationals of a Member State. This is particularly clear as far as freedom of movement of workers is concerned.[4]

According to the relevant rules in force, and to their interpretation by the Court of Justice, nationals of a Member State have a wide range of rights protecting their freedom to migrate to another Member State to work there. Some EC Treaty provisions and several instruments of secondary Community Law assure and protect that freedom of movement.

As far as workers are concerned, this freedom is regulated primarily by Article 48 of the EC Treaty, which provides that

> "1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
> (a) to accept offers of employment actually made;
> (b) to move freely within the territory of Member States for this purpose;

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[3] In the beginning of that section reference will also be made to the issue of reverse discrimination.

[4] For an overview of the rights enjoyed by nationals of Member States within the framework of free movement of workers see, e.g., Johnson, Esther & O'Keeffe, David "From discrimination to obstacles to free movement: Recent developments concerning the free movement of workers 1989-1994", *CMLRev*, Vol.31, 1994, No.6, pp.1313-1346; Lasok, D. & Bridge, J.W., *Law and Institutions of the European Union*, London, Butterworths, 1994, pp.435-453; Mattera, A. "La libre circulation des travailleurs à l'intérieur de la Communauté européenne", *RMUE*, 1993, No.4, pp.47-108; Steiner, J., *Textbook on EC Law*, 4th.ed., London, Blackstone, 1994, pp.208-230; Weatherill, S. & Beaumont, P., *EC Law - The Essential Guide to the Legal Workings of the European Community*, London, Penguin, 1993, pp.481-502.

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service."[5]

Articles 49, 50 and 51 of the EC Treaty elaborate further on the activities to be developed to attain a true freedom of movement of workers.

Moreover, these Treaty provisions were implemented by several instruments of secondary Community Law. These instruments also developed additional rights for nationals of Member States.

Regulation 1612/68, for example, establishes the general framework for the development of free movement for workers within the Community.[6] It forbids discrimination in a wide range of aspects related to the migration of nationals of one Member State to work in another Member State. Its detailed rules prohibit discrimination in the access to employment in a Member State by a worker who is national of another Member State.[7] He or she must not be discriminated against either as regards any conditions of employment or work,[8] "social and tax advantages",[9] access to training in vocational schools and retraining centres.[10] Furthermore, the worker must be assured equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto - including the right to vote and to be eligible for the administration and management posts of trade unions.[11] He or she also has "the right of eligibility for workers' representative bodies in the undertaking" where he or she works.[12] Moreover, he or she must not be discriminated against as regards rights and benefits "in matters of housing, including ownership of the housing he [or she] needs."[13] In addition, to facilitate the worker's movement to another Member State, the worker's close relatives have the right to move with him or her to that country.[14] Other relatives shall have their admission facilitated.[15] The relatives with the right to be admitted who may also work in the host

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[5] Emphasis added. This Article was not amended, either by the European Single Act, or by the Treaty on European Union.

[6] Regulation 1612/68/EEC of the Council on freedom of movement for workers within the Community, OJ L 257/2 of 19/10/68, later amended.

[7] Articles 1 to 6 of Regulation 1612/68, quoted supra.

[8] Idem, Article 7(1).

[9] Ibidem, Article 7(2).

[10] Article 7(3).

[11] Article 8.

[12] Idem.

[13] Article 9.

[14] Article 10(1), under the conditions established in Article 10(3). These conditions were interpreted in a manner that protects the worker and his or her family in case 249/86, Commission v. Germany, (Re Housing Conditions) [1989] ECR 1263, explained in section B of chapter 8.

[15] Provided they are dependent on the worker or are living with him or her when the worker moves to another Member State - Article 10(2).

Member State,[16] and the children of worker's family, if residing in the host Member State, may have access to educational and vocational training courses in conditions similar to those of the children of national workers.[17] Finally, Regulation 1612/68 also includes special provisions for clearance of vacancies and on applications by workers who are nationals of one Member State for employment in another Member State.[18]

Other instruments of secondary Community Law complement this Regulation. Directive 68/360, for example, provides detailed rules for the abolition of restrictions concerning on movement and residence within the Community of workers and members of their families.[19] Directive 64/221 regulates the limitations mentioned in Article 48(3), by coordinating measures concerning the movement and residence of foreign nationals that are justified on the grounds of public policy, public security or public health.[20] Regulation 1251/70 establishes, under certain conditions, the right of the workers to remain in the territory of a Member State after having been employed there.[21] Moreover, Regulation 1408/71, regulates the application of social security schemes to employed persons and their relatives moving in the Community. It is meant to diminish the eventual negative effects that freedom of movement may have on the social security rights of migrant workers and their families. It forbids discrimination on the grounds of nationality against migrant nationals of a Member State who are covered by the Regulation. It also arranges for the aggregation for social security purposes of periods of insurance, residence and employment.[22]

These instruments, considered as a whole, provide a broad range of rights to nationals of Member States who migrate as workers to another Member State. Nevertheless these rights have been expanded even more, namely as a result of two factors.

(1) First, the Court of Justice has taken a rather liberal attitude in this field. In general terms the Court has adopted a doctrine that is quite protective of the rights of migrant workers who are nationals of a Member State. The tendency of the Court has been to

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[16] Article 11.

[17] Article 12.

[18] Articles 13 to 23 of Regulation 1612/68, quoted supra.

[19] Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers and members of their families, OJ L 257/13, of 19/10/68, later amended.

[20] Council Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 56/850 of 4/4/64, later extended in scope - see OJ L 14/14, of 20/1/75. On the judicial protection to be secured to persons covered by this Directive, namely third country national relatives of a migrant national of a Member State, see joined cases C-297/88 and C-197/89, Massam Dzodzi v. Belgian State, [1990] ECR I- 3763.

[21] Regulation (EEC) No 1251/70 of the Commission on the right of the workers to remain in the territory of a Member State after having been employed in that State, OJ L 142/24 of 30/6/1970.

[22] Regulation (EEC) 1408/71 of the Council on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ L 149/2 of 05/07/71; latest consolidated version in OJ C 325/1, of 10/12/92 (initially applied only to employed persons and their families, it was extended to self-employed persons and members of their families by Regulation (EEC) 1390/81 of the Council, OJ L 143/1, of 29/5/1981).

"construe broadly"[23] Community rules granting rights related to the free movement of workers, while restrictively interpreting Community rules allowing for the limitation of such rights. Only a few examples of this tendency need to be recalled at this instance. Some other examples will be mentioned later in this chapter. The Court has stated, for example, that rights to free movement are conferred directly by the Treaty provisions. Secondary Community Law implementing this provision does not create new rights, but merely gives closer articulation to the Treaty provisions, by determining the scope and detailed rules for the exercise of the rights directly conferred by the Treaty.[24] Furthermore, the Court ruled that the notion of a "worker" used by EC Law is not to be defined by national legislation, but has a Community meaning.[25] Thus, the Court was itself able to interpret that notion and has done so in quite a liberal manner. It has considered, for example, that a part-timer, in spite of having a salary below the minimum subsistence level and having to rely on public financial assistance of the host Member State, was nevertheless a worker for Community Law purposes.[26] Moreover, according to the Court of Justice, the concept of public policy, which may constitute grounds for limiting freedom of movement, is to be interpreted restrictively.[27] Likewise, the Court of Justice restricted substantially the material scope of the reservation clause of Article 48(4), which excluded in generic terms employment in the public service from the provisions on free movement of workers.[28] Furthermore, a protective doctrine of the position of migrant workers who are nationals of Member States has usually been applied by the Court as far as instruments of secondary Community Law are concerned. This has occurred on various occasions. The interpretation of the material scope of Regulation 1408/71, on application of social security schemes to migrant employed persons and their relatives, is one of such cases.[29] Another well-known example concerns the interpretation of the concept of non-discrimination on social advantages mentioned in Article 7(2) of Regulation 1612/68. The Court has interpreted this concept in a very broad manner.[30]

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[23] See, e.g., case 139/85, Kempf v. Staatssecretaris van Justitie [1986] ECR 1741, and case 316/85, Lebon [1987] ECR 2811, paragraph 23.

[24] Case 48/75, Procureur du Roi v. Royer [1976] ECR 497, paragraphs 23 and 28.

[25] Case 53/81, Levin v. Staatssecretaris van Justitie [1982] ECR 1035, paragraph 11.

[26] See case 139/85, quoted supra, paragraph 14.

[27] Case 41/74, Van Duyn v. Home Office [1974] ECR 1337, paragraph 18; and case 30/77, R v. Bouchereau [1977] ECR 1999, paragraph 33.

[28] The Court restricted this reservation to "posts which involve direct and indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities". See Case 149/79, Commission v. Belgium, [1980] ECR 3881, at 3900. See also the opinion of Advocate General Mayras in case 152/73 Giovanni Maria Sotgiu v. Deutsche Bundespost, [1974] ECR 153. This opinion influenced very much the definition given by the Court in the former case.

[29] See Wyatt, D. & Dashwood, A. et al., *European Community Law*, 3rd. ed., London, Sweet & Maxwell, chapter 11; and Steiner, op.cit., chapter 21.

[30] See below, section B. Another example is case 249/86, Commission v. Germany, quoted supra and explained in section B of chapter 8. In that case the Court restrictively interpreted Article 10(3) of Regulation 1612/68, which requires that for the family members of a migrant worker to install themselves with him or her in another Member State, the worker must have available for them "housing considered as normal for national workers in the region where he is employed".

Secondly, rights related to freedom of movement for nationals of a Member State have been further expanded by instruments not directly related to the free movement of workers. Community rules on the free movement of services and on the freedom of establishment develop further the rights that nationals of Member States have to migrate to work in another Member State. Likewise, the three Directives adopted in 1990 on the right of residence of students, of pensioners and of other nationals of Member States, increase the possibility for nationals of Member States to move within the Community.[31] Finally, after the entry into force of the implementing instruments of the relevant rules of the Treaty on European Union, migrant nationals of a Member State may even vote and be elected in European and local elections in the host Member State.

The conclusion is that nationals of Member States who move to another Member State are, under Community Law, positioned in the host Member State in a situation very similar to that of the nationals of the latter country. They enjoy there a legal status that includes a wide range of rights, particularly as far as the social and economic areas are concerned.

The legal status of nationals of one Member State can in this respect be compared to that of third country nationals residing in Member States. What rights of freedom of movement do third country nationals enjoy, independently of any relationship with a national of a Member State?

The answer is none.

Third country nationals residing in Member States have no rights related to the freedom of movement of persons, independently of a family relationship with a migrant national of a Member State, or of the fact that they work for an EC enterprise providing services in another Member State.

(ii) Legal basis for the exclusion of third country nationals from the personal scope of freedom of movement of workers

Article 69(1) of the Treaty of the European Coal and Steel Community and Article 96 of the European Atomic Energy Community, make explicit provision that the free movement of workers that they envisage is for nationals of Member States.[32] In the meantime, in the Treaty of the European Economic Community, the first paragraph of Article 48 established that freedom of movement "for workers" was to be secured "by the end of the transitional period at the latest". According to its paragraph 2, such freedom of

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[31] See the following Directives, analysed infra in section B: Council Directive 93/96/EEC of 29/10/1993 on the right of residence for students, OJ L 317/59 of 18/12/1993; Council Directive No. 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180/28, of 13/7/90; and Council Directive No. 90/364/EEC on the right of residence for persons who do not enjoy this right under other provisions of Community Law, OJ L 180/26, of 13/7/90.

[32] Although in other Articles of the same treaties general reference is made to "workers"; for instance in the field of wages or health and safety. See Articles 46, 48, 56, 68 and the very Article 69(4) of the ECSC Treaty and Articles 2 and 30, as well as 97, 148 and 196 of the EAEC Treaty.

movement entails the abolition of any discrimination based on nationality "between workers of the Member States".[33]

Meanwhile, several instruments of Community Law, adopted to implement Article 48 of the E(E)C Treaty, reserve for nationals of the Member States only, the rights to the free movement of workers.

That is the case of Regulation 1612/68 on the freedom of movement for workers within the Community and of Council Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers and members of their families.[34] Both these instruments put the close relatives of the workers who are nationals of a Member State under the protection of Community Law, regardless of the nationality of the former. Thus, third country nationals who are relatives of migrant workers nationals of a Member State do enjoy some rights of free movement when joining the latter in their movements within the Community. Nevertheless, under the instruments already referred to, workers who are nationals of third countries and reside in a Member State, do not, themselves, have the right to move to another Member State and work and reside there.

However, certain third country nationals do have Community Law rights under Regulation 1408/71, on the application of social security schemes to employed persons, self-employed persons and their relatives moving in the Community.[35] This regulation was adopted in pursuance of Article 51, which envisages the enactment of "measures in the field of social security as are necessary to provide free movement of workers".[36] The Regulation covers not only workers who are nationals of a Member State and the members of their families (even if they are third country nationals), but also covers workers who are stateless persons or refugees, as well as the members of their families (including their survivors), if they are residing in a Member State.[37]

In the Meade case,[38] the European Court of Justice held admissible the exclusion of third country nationals from the scope of the EC Treaty rules on free movement of workers, namely Article 48. This was done in an implicit but absolutely clear manner. This judgment is the main reason for sustaining that, under the EC Treaty, the free movement of workers is limited to nationals of Member States. It leaves no doubts as to the state of the law regarding the issue. However, the Court did not contribute to the discussion with any arguments. From a theoretical perspective, therefore, the discussion remains open.

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[33] Emphasis added.

[34] See Article 1 of Regulation 1612/68/EEC of the Council on freedom of movement for workers within the Community, OJ L 257/2 of 19/10/68, later amended; and Article 1 and 2 of Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers and members of their families, OJ L 257/13, of 19/10/68, later amended. See also Article 1 of Council Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 56/850 of 4/4/64 - later extended in scope, see OJ L 14/14, of 20/1/75.

[35] See Article 2(1) of Regulation 1408/71, quoted supra.

[36] The same Article also refers that "to this end [the Council] shall make arrangements to secure for migrant workers and their dependants: (...) b) payment of benefits to persons resident in the territories of Member States".

[37] See Article 2(1) and (2) of the same Regulation, quoted supra.

[38] Case 238/83, Caisse d'Allocations Familiales de la Région Parisienne v. Mr. and Mrs. Richard Meade, [1984] ECR 2631-9. See in particular 2638-9.

b) Discussion on the personal scope of Article 48 of the EC Treaty

(i) general overview

The legal literature was, and still is, split on the precise personal scope of Article 48.[39]

On the one hand, there are those who believe that nationality of a Member State is the sole possible criteria for determining who may benefit from this freedom. In the most extreme formulation of this perspective, it is sustained that it would otherwise mean "that the Treaty intended to grant immigration rights to workers from the whole world".[40] This pushes the argument too far, to say the least.

As Hartley puts it, we may at least think about two criteria, nationality and residence; emerging with four possible solutions. The freedom would include either:
- all nationals of Member States, irrespective of their place of residence;
- all residents in the Member States, regardless of their nationality;
- all nationals who are also residents; or, finally,
- all persons who are either nationals or residents.

Hartley believes nationality is the correct criterion, but he is honest enough to admit that the "Treaty gives no clue as to which of these [four possible solutions] is correct".[41]

(ii) comparison with other provisions on free movement

In this context, it is useful to make a comparison between Article 48 and the other Articles on free movement in the European Union.

As already mentioned, the Treaties on the ECSC and the EAEC explicitly reserve free movement of workers for nationals of Member States. The same also happens, under the EC Treaty itself, in relation to the beneficiaries[42] of the freedom of establishment and of free movement of services - according to Articles 52 and 59, respectively.[43] Article 59(2) even makes explicit mention of the possibility of extending rules on free provisions of services to third country nationals established within the Community.

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[39] In favour of the position that Article 48 does not preclude persons other than nationals of the Member States to benefit from free movement of workers, see Böhning,W.R., *The Migration of Workers in the United Kingdom and the European Community*, London, Oxford University Press for the Institute for Race Relations, 1972, p. 136; Campbell, A., *Common Market Law*, London, Longman, 1969, Supplement 2, 1971, p.226; and Plender, *International Migration Law*, op.cit., pp. 197-8. For an overview of the discussion of the matter, including on the proposals for the application of Article 48 to third country nationals residing in the Union, see Lanfranchi, M.-P., *Droit Communautaire et Travailleurs...*, op.cit., pp.20-41.

[40] Oliver, op. cit. at p. 62.

[41] Hartley, T.C., *EEC Immigration Law*, Amsterdam, North Holland, 1973, p.54. Hartley believes that a restrictive interpretation, based on nationality, "fits in with the provisions concerning establishment and services" and adds that there "can be no doubt that it is correct". See infra, my analysis of this issue in the main text.

[42] Here, I refer only to natural persons; for legal persons see infra, in the main text.

[43] However, no such measures were yet adopted. Free movement of services only exists now in relation to nationals of a Member State.

All these rules are different from Article 48, in that they clearly make a distinction between nationals of Member States and third country nationals - excluding the latter from their scope, except in Article 59(2).

We may think it is not just a casual difference that the other provisions establish an explicit delimitation of their personal scopes whilst Article 48 does not. It could be that in Article 48 it was not the intention to establish any distinction between persons working in the Member States.[44] In this view, the expression "workers of the Member States" would contain no reference to their nationality and would simply mean workers within the economies of the Member States, i.e. in their labour market.[45]

The contrasting argument, that if Articles 52 and 59 only grant rights to nationals of a Member State, then Article 48 should be understood as doing the same,[46] appears to be less consistent. Several arguments have been put forward sustaining that the differences between the provisions could have a rational explanation.

It could be that "the draftsmen wished to leave open, in 1957, the possibility that the Community might develop a common market in labour corresponding with the common market in goods", accompanied by a common external policy dealing with labour from third countries and freedom of movement within the Community for established immigrants.[47]

Moreover, in relation to workers, the most important economic consideration is mobility, but in the domain of the freedom of establishment, for instance, this is less important. As Plender states, the "freedom of an unemployed person in France to take up employment in the F.R.G. will be beneficial to both countries, even if the migrant is a Moroccan." However, the granting to third country nationals, e.g. the right to free establishment, could create serious problems - like those related to mutual recognition of qualifications and admission to professional organisations.[48]

The fathers of the Treaty may also have foreseen the possibility that if "nationals of the Member States were to be the sole recipients of the expensive privileges given to migrant workers they would become less attractive to prospective employers than nationals of third countries", whereas in the case of establishment, the persons are by definition self-employed.[49]

Finally, it should not be forgotten that the rules on freedom of establishment and on free movement of services apply to legal persons too. The Treaty authors could have

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[44] See Campbell, op.cit., Supplement 2, 1971, p.226; Böhning, W.R. *The Migration of Workers in the United Kingdom and...*, op.cit., p.81; and Plender, *International Migration Law*, op.cit., p.197. See also Böhning, W.R. "The Scope of the E.E.C. System of the Free Movement of Workers: A Rejoinder", *CMLRev*, Vol. 10, 1973, No.1, p.81, at 83.

[45] See Plender, R. "An Incipient Form of European Citizenship", in *European Law and the Individual*, Jacobs, F.G. (ed.), Amsterdam, North Holland, 1976, p.43.

[46] See, e.g., Hartley op.cit. pg. 54 .

[47] Plender, *International Migration Law*, op.cit, p. 197. Lanfranchi points out that such a common external policy has not been accomplished and that Article 48 had been given direct effect by the Court of Justice. See Lanfranchi, M.-P., *Droit Communautaire et Travailleurs...*, op.cit., p.26. However, this observation does not seem to invalidate Plender's assessment, as such.

[48] Plender, "An Incipient Form of European Citizenship", op.cit., p. 43, footnote 24.

[49] Idem, p.43.

wanted their scope to be more limited as far as third country nationals are concerned, than the scope of Article 48.[50]

(iii) other points in the discussion

Plender recalls that the term "worker" is also used in other Community instruments "without an implied reference to nationality".[51] Such a use occurs, for instance, in some Directives on the approximation of laws for the protection of workers, like those relating to collective redundancies,[52] to employees' rights in the transfer of undertakings[53] or to the insolvency of their employer.[54] Plender argues that "it might be assumed at first sight that a single term has a single meaning in a single body of law."[55]

This seems a perfectly logical argument. As is suggested in section C of this chapter, it would be difficult to argue that those Directives do not apply to workers who reside in the Community but who are nationals of third countries. However, perhaps Plender's argument has to be seen in a critical perspective as far as the point just mentioned is concerned. The issues at stake in the Directives and in Article 48 are qualitatively different. It is one thing to establish that, under instruments of secondary Community Law, in certain cases, once third country nationals have the right to work in a Member State, they should be as much protected as workers who are nationals of a Member State. Another, very different thing, is to accept that third country national workers, residing in a Member State, have the right to free movement within the Union.[56]

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[50] Evans, A. C. "Nationality Law and the Free Movement of Persons in the E.E.C.: with Special reference to the British Nationality Act 1981", *YEL*, Vol.2, 1982, pp.173-189, at 177.

[51] See Plender, "An Incipient Form of European Citizenship", op.cit., p. 43.

[52] Council Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies, OJ L 48/29 of 22/2/75, amended later, OJ L 245/3 of 26/8/92.

[53] Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61/26 of 5/3/77.

[54] Council Directive 80/987/EEC of 20/10/1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 283/23 of 28/10/1980, amended later - OJ L 66/11 of 11/3/87. Note that all these three Directives were adopted under article 100 of the EC Treaty, on approximations of provisions which "directly affect the establishment or the functioning of the common market".

[55] See Plender, "An Incipient Form of European Citizenship", op.cit., p. 43.

[56] In a common or internal market, it would certainly be more coherent that, once a person is admitted to the labour market of one Member State, that person have all the rights of other workers, including the right to move residence to work in another Member State. However, the issue here is to know whether such arguable coherence was intended to have legal force by the Community legislator, when it adopted Article 48 of the EEC Treaty and the Directives mentioned by Plender. It does not seem possible to conclude that the Community legislator had such an intention by virtue of the simple fact that the mentioned Directives include third country nationals in their personal scope. Meanwhile, one may note that a distinction similar to that made in the main text was also made by Advocate General Lenz in the Reed case, analysed in section B. He analysed the reference made in Article 7(2) of Regulation 1612/68 to the enjoyment by migrant nationals of one Member State of the same social advantages "as national workers" of the host Member State. He sustained that this rule applied only to the delimitation of the rights of workers entitled to be admitted, and not to the delimitation of the category of persons entitled to be admitted. See the A. G. Lenz's opinion, in case 59/85, Netherlands v. Ann Florence Reed [1986] 1283, at p.1292. The Court (and rightly so) did not accept such distinction in that case. Nevertheless the distinction may be useful for questioning the validity of Plender's view that "a single term has a single

Therefore it is possible that the same words, in a different context, could intentionally have a different significance.[57]

Pointing to the difference between the expression "workers" used in the first paragraph of the Article 48, and that of "workers of the Members States" in its second paragraph, some authors sustain that the two paragraphs have different personal scopes. The first paragraph, establishing the freedom of movement "for workers" in general, would apply to all workers. Meanwhile, the second paragraph, prohibiting discrimination "between workers of the Member States", would benefit only nationals of these states.[58] Thus, third country national workers would have the right to move freely within the Union, but could be discriminated against, especially in relation to workers who are nationals of a Member State. This reasoning, while trying to give some protection to third country national workers, in fact gives support to the idea that the expression "workers of the Member States", in article 48(2), means workers who are nationals of a Member State. However, it is not clear why that should be the case, nor the reason for differentiating between the scope of paragraphs 1 and 2 of Article 48. It may be noted that paragraph 2 refers to paragraph 1 of the Article, when establishing what "such freedom of movement" must entail. Moreover, as the "Spaak Report" mentions, it was clear from the beginning that a true freedom of movement of workers necessarily entails that "toute discrimination est effectivement interdite entre travailleurs nationaux et travailleurs immigrés".[59] To a certain extent this goes against the idea that freedom of movement could exist without discrimination against its beneficiaries being prohibited.

(iv) the case of Regulation 1408/71 on social security

Article 2 of Regulation 1408/71,[60] on the application of social security to workers moving within the Community, states that the Regulation applies to three groups of persons:

> "(1) (...) to employed or self-employed persons (...) who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors";

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meaning in a single body of law", this body being composed by Article 48 of the EC Treaty and secondary instruments of EC Law on workers' protection. See supra in the main text.

[57] Furthermore, the Directives mentioned use only the word "employees", or "workers", and not "workers of Member States", as Article 48 does - even if only in its second paragraph. This difference would be relevant if the prevailing interpretation that "workers of Member States" means workers who are nationals of a Member State was correct.

[58] See Campbell, A., *Common Market Law*, London, Longman, 1969, Supplement 2, 1971, p.226, who sustains that "the scope of paragraph 1 of Article 48 is clearly and intentionally wider than that of paragraph 2." See also Böhning, "The Scope of the E.E.C. System of the Free Movement of Workers...", op.cit., p. 83.

[59] See the Spaak report, "*Rapport des chefs de Délégation aux Ministres des Affaires Etrangères* by the "Comité Intergouvernemental créé par la Conférence de Messine, Mae 120 f/56(corrigé), Bruxelles, 21/4/1956 (Secretariat), at p.89 - alineas b) and c). See also Neri, S. & Sperl, H., *Traité instituant la Communauté Économique Europeenne - Travaux Préparatoires, Déclarations interprétatives des six Gouvernements, Documents Parlementaires*, Luxembourg, Cour de Justice des Communautés Européennes, 1960, at pp.147-148.

[60] Quoted supra.

"(2) (...) to the survivors of employed and self-employed persons (...) irrespective of the nationality of [the latter], where their survivors are nationals of one of the Member States, or stateless persons or refugees[61] residing within the territory of one of the Member States"; and
"(3) (...) to civil servants and to persons who (...) are treated as such(...)".[62]

The relationship between the personal scope of this Regulation and of Article 48 was put to the test in the Meade case.[63] This case concerned a couple, an English woman and an American citizen, both living in France, where only the latter worked. One of their children went to study in England and, due to this fact, the family allowance that they had received until then was withdrawn by the French authorities. The couple contested this decision, invoking both article 48 of the EC Treaty and Regulation 1408/71. As it was clear that Regulation 1408/71 did not apply to the case, the aim was to know if the Regulation contravened Article 48, by limiting its scope to workers who are nationals of a Member State.

The Court took only one paragraph to deal with the question of the personal scope of the freedom of movement, stating that:

> "According to its article 2 (1), Regulation 1408/71 only applies to the workers of one of the Member States and to the members of their family, as well as article 48 only grants the freedom of circulation of persons to the workers of the Member States. As we can see in the file the question of the national court was related to a situation where a child has a father who is a citizen from a third country and a mother who is not an employed person. In these circumstances Regulations 1408/71 is not applicable." [64]

In the end the Court concluded that:

> "neither Regulation 1408/71 nor Article 48 of the Treaty prevents family allowances from being withdrawn pursuant to national legislation, on the ground that a child is pursuing its studies in another Member State, where the parents of the child concerned are nationals of a third country or are not employed persons."[65]

The Court referred to none of the arguments adduced above, nor to any other, that question the exclusion of third country nationals from the personal scope of freedom of movement of workers. In dealing with the issue so briefly, the Court seems to have taken the view that it was obvious that article 48 does not apply to third country nationals. The

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[61] As defined by the New York Convention relating to the Status of Stateless Persons, of 28/9/1954 (UNTS, Vol.360, p.117) and the Geneva Convention relating to the Status of Refugees, of 28 Jul. 1951 (UNTS, Vol.189, p.137), respectively. The latter Convention was ratified by all Member States of the then EEC, and also by all of the present European Union. The Convention on stateless persons was ratified by all Member States, except Austria, Portugal, and Spain.

[62] Cf. Article 4 of the European Convention on Social Security, of 1972, ETS, No.78. This Convention was ratified by Austria, Belgium, Italy, Luxembourg, Netherlands, Portugal, Spain and Turkey. See supra, chapter 1, section B. The fundamental difference between the two provisions is that in Regulation 1408/71 stateless workers are entitled themselves to rights of the Regulation, which is not the case in the Convention - see Article 4(1)(a) of the latter.

[63] Quoted supra.

[64] Idem, paragraph 7 of the judgment.

[65] Ibidem, paragraph 10.

Court limits itself to stating this, but it does not explain why that is so. Therefore, it did not make a contribution to the substantial discussion on the issue. The Court just solved the issue by simple virtue of its power, not its arguments.[66]

The restrictive interpretation of Article 48 by the European Court of Justice contrasts with its decisions in other matters, where the Court adopted a more liberal interpretation of rules on free movement of workers. Such liberal interpretation occurred, for example, with regard to Article 48(4), which establishes that the free movement of workers does "not apply to employment in the public service". The Court restricted this reservation to "posts which involve direct and indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities".[67]

Clearly, as a matter of judicial policy, it was easier for the Court to extend the material scope of the free movement of workers to the public service, than to extend its personal scope to third country nationals. However, this reason has nothing to do with legal considerations.

Meanwhile, it may be interesting to examine in detail the legal basis of Regulation 1408/71. The first considerandum states that its legal basis is: "the Treaty establishing the European Economic Community, and in particular articles 2, 7 and 51". The indispensable reference to article 51 takes on a rather curious aspect in this context. Article 51 allows the Council to "adopt such measures in the field of social security as are necessary to provide freedom of movement for workers". Thus it unquestionably relates its personal scope to that of Article 48, yet this was previously considered by the Council to include only nationals of the Member States.[68]

Naturally, there is a general reference to the EC Treaty. This could be sufficient to cut short the argument that the Council accepted the idea that the provisions of the freedom of movement for workers could also be applicable to community foreigners. Nevertheless, it seems clear that the Council did not feel the need to specifically invoke Article 235 to justify the application of a Regulation 1408/71 to some third country national workers.

Incidentally, it should be noted that later modifications of the Regulation, made in a different time and in a different context, already make express reference to Article 235 as part of their legal basis.[69]

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66 Yet, it is submitted that perhaps the Court should be persuasive, or at least it could try to be so.

67 See cases 149/79, and 152/73, quoted supra.

68 For instance, when enacting Regulation 1612/68.

69 The reference to Article 235, as the legal basis of the amendments to Regulation 1408/71 has been made since Regulation No.1390/81 (OJ L 143/1 of 29/5/1981) extended, to self-employed persons and members of their families the personal scope of the former. Later on, after Regulation 1660/85 (OJ L 160/1 of 20/6/85), the previously constant reference to Articles 2 and 7 (as part of the legal basis) was abandoned. In this regard it may be stressed that while the need to invoke Article 235 as legal basis of a Regulation was not felt to grant rights to refugees, the need to invoke it was felt necessary in relation to the free movement of self-employed persons (with the nationality of a Member State) and members of their families. The interesting point is that the free movement of the latter had already its basis on clear Treaty provisions.

(v) conclusion

It is submitted that Article 48 could be understood as applicable also to all third country nationals with permanent residence in the Community. A judicial interpretation of the personal scope of the free movement of workers could consider third country nationals as permanently resident in the Community if, under national laws, they had an unlimited right of residence in one Member State. In addition, all third country nationals who have resided in one or more Member States, for more than a total of ten continuous years, or fifteen non-continuous years, should also be considered as being permanent residents of the Community. However, an optimal solution would have to have a legislative character, in which free movement of workers would be gradually extended to third country nationals residing for a minimal period of time in the European Union. In the meantime, the suggested judicial interpretation of Article 48 could be applied.

For all the reasons already mentioned, this seems to be the best interpretation of Article 48. However, there is one point which is perhaps even more important than arguing for such an interpretation. What is crucial to emphasise is that, undoubtedly, Article 48 is not entirely clear as far as its personal scope is concerned. It is not clear enough to facilitate an indisputable interpretation. Thus, it could, at least, be accepted that the restrictive interpretation of Article 48, is not, from a legal point of view, the only possible and reasonable interpretation, even if it was the better one. Perhaps it could be accepted that another interpretation, one that includes third country nationals legally resident in the Community, is not absurd from a legal point of view. The conclusion seems logical: a restrictive interpretation seems, at least, to be as much based on a political choice as it is on strictly legal arguments. In so far as it is based on a political choice, it is better to submit it to political debate, not only to a legal discussion, strictly speaking.

It may also be relevant to recall the context in which the decisions on the personal scope of the freedom of movement of workers were taken. Article 48, with a general reference to "workers" and "workers of the Member States", was adopted in 1957. By that time, the majority of people immigrating to each of the then six Member States were nationals of another Member State. Immigration from third countries was only about one third of the total immigration to the then 6 Member States. By 1968 the situation had to some extent been reversed. Immigration from other Member States was approximately one third, and immigration from third countries two thirds of the total immigration to Member States.[70] By then, Regulation 1612/68 limited free movement of workers to nationals of a Member State and their families.

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[70] In 1958, when the EEC Treaty entered into force, 62,5% of the immigration to the then six EEC Member States came from another Member State, while only 37,5% of it came from a third country. In 1968, 31,4% of immigrants came from one Member State, while 68,6% came from a third country. The statistics for 1956 and 1967, that could be in the mind of those deciding on the personal scope of free movement of workers, do not change this assessment. See the data gathered in Eurostat, *Foreign Population and Foreign Employees in the Community*, 1985, Luxembourg. This data is analysed in Straubhaar, Thomas, "International Labour Migration within a Common Market: Some Aspects of EC Experience", *JCMS*, Vol.XXVII, 1988, No.1, pp.45-62; see particularly Table 1, at pp.52-3. Note also that, according to Falchi, in 1968, in the 6 Member States there were a total of 2.560.000 employed foreigners, 843.000 of whom were nationals of a Member State and 1.717.000 who were third country national. See Falchi, op.cit., p.19. Note also that in 1983, the year's statistics which the Court could

In 1971, the Commission proposed to equalise gradually and completely the legal status of migrant workers from third countries to that of nationals of Member States.[71] However, the Council never took any measures in this direction.

In July 1984, when the Court of Justice ruled on the Meade case, it was already too late for any large scale change to be made by the judiciary alone. By this time, the political and economic situation in the Community had changed considerably. Unemployment had been rising since the oil crisis of 1973 and the strength of the extreme right-wing had dramatically increased.[72] To declare that Article 48 was applicable to third country nationals was more difficult than in 1968, when Regulation 1612/68 was adopted.

Moreover, the Court lacked the flexibility of the politicians in extending the EC rules on free movement of workers to third country nationals. By 1984, the legal dynamics were completely different to those of 1968. The transitional period had already ended and Article 48 had already been held to have direct effect. If the Court of Justice had at that stage declared that Article 48 applied also to third country nationals resident in the EC, millions of them would have immediately acquired the right to work and live in another Member State. A compromise solution, such as a gradual programme of liberalisation of the movement of third country national workers within the Community, could have been established by the EC Council, but hardly by the Court.[73]

Finally, it must be noted that the argument in favour of the application to resident third country nationals of EC rules on freedom of movement of workers is also justified on important substantial grounds. Third country national residing in the Union should be seen as members of European society. Most of them reside here for quite a long time, or were even born here. It is a matter of material justice to grant such a right to them. Furthermore, the right to such freedom could improve their social integration, which is a matter of common interest to the Union. This is particularly relevant since they are a very large number of people, and their social marginalisation already has negative social effects and may even have more in the future. Moreover, they contribute to the objectives of the

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eventually have in mind when deciding the Meade case, in the then 10 Member States there were a total of 12.709.068 persons living in a State which was not the one of their nationality. 9.105.077 of them were third country nationals residents (71,6% of the total foreigners) and 3.603.991 were nationals of a Member State residing in another Member State (28,3% of the total foreigners). This numbers are based on data taken from *Demographic Statistics*, Eurostat, several volumes from 1984 to 1990 and from *Censuses of Population in the Community Countries 1981-1982*, Eurostat, 1988. The data is from 1983, except for Italy and Luxembourg (concerning which data is based on the 1981 censuses) and for France (based on the 1982 census) and Greece (also based on 1982 data). See also Lebon's estimations for the foreign population residing in 1986-7 in the then 12 Member States, Lebon, A. "Chronique Statistique: Ressortissants communautaires et étrangers originaires des pays tiers dans l'Europe des douze", *Revue Européenne des Migrations Internationales*, Vol.6, 1990, No.1, p.185.

[71] "Preliminary Guidelines for a Community Social Policy Programme", by the Commission of the European Communities, of 17 March 1971, in Supplement 2/71 annexed to Bull. EC, 4/71.

[72] Two years later, in 1988, Mr.Le Pen obtained 15% of votes in the French presidential elections.

[73] It may also be noted that the Meade case was decided by the third chamber of the Court, with three judges only. This could have been one further reason for them to refrain from making what could be seen as an innovative judgment, were it to extend to third country nationals Community rules on freedom of movement of workers.

Community as defined in Article 2 and 3 of the EC Treaty,[74] and should also share the advantages of living in the Union.

Until the present date several proposals have (unsuccessfully) been presented to extend the rights of free movement of workers to third country nationals. The European Parliament has presented several proposals to that effect.[75] As far as the Commission is concerned, it announced in its "Medium Term Social Action Programme" for 1995-1997,[76] that it planned to present in the first half of 1996 a recommendation to the Member States inviting them to give employment priority to

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[74] Note, e.g., the Interinstitutional Declaration Against Racism and Xenophobia of 11 June 1986, which refers that the signatory institutions were "[m]indful of the positive contribution which workers who have their origins in other Member States or in third countries have made, and continue to make, to the development of the Member State in which they legally reside and of the resulting benefits for the Community as a whole". See the last recital of the Preamble of the resolution, Doc.ref. 86/C 158/01, OJ C 158/1 of 25/6/86. See also O'Keeffe, who sustains that "the principle of equal treatment under Community law should be applied to third country workers and self-employed already resident and working in the Community. Such migrants should also enjoy the right of free movement within the internal market. If the Community is to have an area without internal frontiers, it becomes progressively absurd that non-Community nationals established in the Community should not be afforded the protection of Community law. If third country nationals work and reside in the Community, as they will in increasing numbers, thereby contributing to the achievement of the aims of the EEC Treaty, the Community has a duty to come to terms with the phenomenon." See O'Keeffe, D. "The Free Movement of Persons and the Single Market", *ELR*, Vol. 17, 1992, No.1, pp.3-19, at 17.

[75] See, e.g., the following Parliament resolutions: on the Commission's draft EEC Council Resolution on Guidelines for a Community Policy on Migration, of 1 March 1985 (COM (85) 48 final), in which the Parliament sustained that freedom of movement and social security rights should be extended to non-community nationals - resolution's point 3-F) and J), PE DOC A 2-4785; on the right of asylum, sustaining that "recognised refugees in the European Community [should] have the same rights and obligations as Community citizens from other Member States" - resolution's point 1 r) of DOC. A2-227/86 of 12 March 1987; on the Joint Declaration against racism and xenophobia and an action programme by the Council of Ministers, in which the Parliament called for the extension of Treaty provisions on free movement of workers, self-employed persons and providers of services to "all persons residents within the territory of a Member State, irrespective of nationality", resolution of 14 February 1989, Doc. A2-261/88, OJ C 69/40 of 20/3/1989; on the Commission proposals for amending Regulation 1612/68, in which the Parliament called for the application of the Regulation to third country nationals "who, before having reached the age of six years, were resident in a Member State and have since regularly held residence there, as well as to recognised political refugees and displaced persons in a Member State who hold residence there(...)" - proposed amendment 76, OJ C 68/93 of 19/3/1990; on the Commission's action programme relating to the implementation of the Community Charter of fundamental social rights for workers - priorities for 1991-1992", calling for a directive granting citizens of non-EEC Member States, who have been legally resident for five years in the Community, the same rights of free movement of persons and rights of establishment as Community citizens - point 33, g) of resolution of 13 September 1990, Document A3-175/90, OJ C 260/167 of 15/10/1990; and on Union Citizenship, proposing that a wide range of rights be granted to "Union citizens and their families and, under conditions laid down by a Union law, other persons resident in a Member State(...)", including not only "the right to move and reside freely throughout the Union" and "to exercise any professional or economic activity without discrimination", but even "the right to exercise any lawful activity on the same terms as citizens of the Member Sates concerned" - proposals No.1(i) and No.4 of resolution of 21 November 1991, OJ C 326/205 of 16/12/91.

[76] Commission communication on a "Medium Term Social Action Programme 1995-1997", COM (95) 134, of 12/4/1995.

"third country nationals permanently and legally resident in another Member State when job vacancies cannot be filled by EU nationals or nationals of third countries legally resident in the Member State concerned."[77]

If accepted, this proposal could be the beginning of a slow process in the right direction, towards the extension of the EC rules on free movement of persons to third country nationals residing in the Union. However, it is more likely that it will only turn out to be the confirmation of the political strength of the current status quo, which excludes them.

c) EC social security rights[78]

As mentioned above, stateless persons, refugees and their family members or survivors are included in the personal scope of Regulation 1408/71 if they are residing in a Member State. Such persons are protected by the Regulation despite the fact that they do not have any Community right to move within the EC. Furthermore, this Regulation also benefits a surviving family of a third country national worker, provided that the members of that family are nationals, stateless persons, or refugees residing in one Member State. After the death of the worker, these persons will be protected to the same degree as if the deceased worker was a national of a Member State. This appears to be quite a sensible rule in itself. However, its own limits, together with the limits of the system in general, may lead to some peculiar situations.

First, not only do those (third country national) workers have to die in order for their family to fully benefit from their work; but their family will benefit from their work in a way that they themselves never could. For example, those workers cannot benefit themselves from the Regulation by asking for an aggregation of periods of insurance to obtain benefits related to old age. In the case of the workers' permanent incapacity to work, neither the relatives of the third country national workers, nor the workers themselves, are protected by the Regulation. This seems to be a really strange situation.[79] The family is legally protected only if the worker dies, not otherwise - no matter what the physical, mental, or financial condition of such workers (or their relatives) may be.

Secondly, the application of the criteria of nationality to the protection of relatives of the worker following his or her death is not less disturbing. The protection of a national of a Member State who is a spouse of a third country national worker contrasts sharply with that of a spouse who is a national of a third country. The latter cannot benefit from the Regulation. The children of a third country national worker are in an equally incomprehensible situation when some of them have the nationality of a Member State and others do not. Here the nationals of a Member State may benefit from the work of their deceased father or mother, while the others may not. Just because of their nationality!

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[77] Idem, point 3.3.5.

[78] On matters regarding the application of the equality principle between nationals of a Member State and nationals of a third country, who have been authorized to reside and work in a Member State and who have accomplished periods of work under the social security legislation of more than one Member State, see *La securité sociale en Europe - Egalité entre nationaux et non nationaux - Proceedings of a European colloquium at Porto, November 1994*, Lisbon, Departamento de Relações Internacionais e Convenções de Segurança Social, 1995.

[79] One could say it is really surrealistic.

This is clearly a highly deplorable rule. It is unfair for the persons concerned and unjustified in the context of current European integration.

It seems clear that in these cases not only is there a differential treatment, but there is indeed discrimination. The differential treatment, it is submitted, is not legitimate. It does not respect the principle of equality, which is a principle of Public International Law. According to this principle equal situations should be treated in an equal manner. The relevant elements of the situation seem to be exactly the same whether the relatives of the dead worker are or are not nationals of a Member State. Clearly, the work which the dead worker performed, the taxes that he or she paid and the Social Security contributions he or she made did not differ according to the nationality of his or her relatives.

The worst aspect of this situation is that national sovereignty would not be challenged if this Regulation were applied to the worker who is a national of a third country. That worker would have no entitlement to the freedom of movement within the Community. He or she could only work in different Member States as long as national governments allowed for such work. Still, he or she is not entitled to ask for a coordination of social security schemes. This situation may prevent him or her from moving within the Community, even in a situation when, indisputably, this would be in the interest of the Member States concerned and of the Community as a whole.

As far as the general reference to Article 2(3) of the Regulation to "civil servants" is concerned, it would seem that it could be interpreted as including third country nationals working as civil servants in the Member States. In the preceding paragraphs, the Regulation was very careful in stating its precise personal scope. So one would presume that it was not pure chance that civil servants were only referred to in a general way. However, the practical importance of this provision is considerably reduced by Article 4(4), which excludes from the scope of the Regulation "special schemes for civil servants and persons treated as such".

Note, finally, that in the Commission "Medium Term Social Action Programme" for 1995-1997, the Commission announced its intention to propose, in the second half of 1996, instruments to "extend to third-country nationals the provision of immediate medical care and other limited benefits".[80]

d) Refugees and EC rights on free of movement of workers[81]

As mentioned above, stateless persons, refugees and their family members or survivors are included in the personal scope of Regulation 1408/71 if they are residing in a Member State. The Commission had suggested that freedom of movement of workers within the Community applied to refugees and stateless persons, irrespective of their

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[80] Point 3.1.9. of COM (95) 134, of 12/4/1995.

[81] See Towle, Simon, *The Development of a Policy on Asylum for the European Community: in the context of the completion of the internal market*, EUI PhD thesis, 1992, particularly at pp.150-2.

nationality.[82] However, this possibility was not accepted by the Council and Regulation 1612/68 does not grant them such a right.[83]

In any case, the representatives of the governments of the Member States, meeting within the Council, adopted two declarations related to the movement of refugees within the Community.[84] The declarations refer to the admission of refugees (established in one Member State and recognised as such under the Convention of 1951)[85] to work as employed or self-employed persons in another Member State. The declarations state that such admission was to be examined with "particular favour" to allow such refugees to enjoy a treatment as favourable as possible in the territory of that other Member State.

The first declaration is from 1964 and concerns the movement of refugees to work as employed persons. It was adopted on the occasion of the approval of EC Regulation No.38/64, on the freedom of movement of workers within the Community. The declaration stated that the situation of refugees cannot be settled within the framework of Articles 48 and 49 of the EC Treaty. The second declaration dates from 1985. It mentioned that the first declaration applied to refugees exercising in an employed capacity activities included in Directive 85/384/EEC.[86] This Directive deals with the mutual recognition of diplomas and other formal qualifications in the field of architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services. The second declaration extended the treatment provided for by the first declaration to access in a non dependent capacity to activities included in this Directive, as well as to its exercise in the capacity of establishment or of provision of services.

It already seems odd that the situation of refugees did not receive more attention by the Council in the context of freedom of movement of persons to work within the Community. However, it looks even stranger that a declaration on the facilitation of access of refugees to work (as self-employed persons) in another Member State regards only architecture.[87] One cannot but be baffled by such a limitation. There is no doubt that

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[82] See Lanfranchi, M.-P., *Droit Communautaire et Travailleurs...*, op.cit., p.27.

[83] See Article 1 of that Regulation, quoted supra.

[84] Declaration 64/305/EEC of 25 March 1964 by representatives of the governments of the Member States of the EEC, meeting within the Council, concerning refugees, OJ 78/1225, of 22/5/64; and the Declaration of the representatives of the governments of the Member States of the European Communities, meeting within the Council, concerning refugees, OJ C 210/2, of 22/8/1985.

[85] Geneva Convention relating to the Status of Refugees, of 1951, quoted supra.

[86] Directive 85/384/EEC on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, OJ L 223/15, of 21/8/1985.

[87] Note that this declaration follows another declaration of the representatives of the governments of the Member States of the European Communities, meeting within the Council. This declaration concerned persons of Greek origin and language, but who were nationals of third countries having a land border with Greece. It dealt specifically with the situation of these persons who having concluded their studies in architecture in a Member State, hold a diploma in the area of architecture recognised by Greek Law and are authorised by this Law to enrol themselves in the relevant Greek technical registry. The declaration stated that Member States shall examine with particular favour the access of these persons to an activity included in Directive 85/384 (quoted supra) and their exercise of such activity, in order to allow those persons to enjoy a treatment as favourable as possible in their territory. See Declaration of the

to always expect to find a complete coherence in the behaviour of EC institutions and national governments is a childish illusion. But this certainly goes too far.

There is another interesting aspect in the above mentioned declarations. As mentioned above, both of them state that the admission of refugees to work in another Member State is to be examined with particular favour to allow such refugees to enjoy a treatment as favourable as possible in the territory of that other Member State. This expression echoes Article 7(4) of the UN Convention on Refugees of 1951.[88] That provision establishes that the Contracting States "shall consider favourably the possibility of according to refugees" rights and benefits beyond the minimum threshold provided by the previous paragraphs of the same Article. This minimum threshold obliges the Contracting States to accord to refugees "the same treatment as is accorded to aliens generally".[89] Furthermore, after three years of residence all refugees shall even "enjoy exemption from legislative reciprocity in the territory of the Contracting States".[90]

In the meantime it may be noted that the right to engage in wage-earning employment is specifically regulated by Article 17 of the Convention. Its first paragraph provides that Contracting Parties shall accord to refugees lawfully staying in their territory "the most favourable treatment accorded to nationals of a foreign country in the same circumstances".[91] Paragraph 2 of the same Article provides that restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to the refugee, inter alia, if he "has completed three years' residence in the country". Finally Article 7(3) provides that the Contracting States "shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals".

It seems clear that the Convention itself does not grant to refugees living in a Member State the right to go and work in another Member State. This is due, namely, to the fact that the Convention imposes obligations on each State in relation to the refugees residing in that very State, not as far as refugees residing in another State are concerned.

Nevertheless, it seems clear that the objective of the Convention is the progressive equalisation of the rights of nationals of the Contracting States and refugees living therein.[92] Arguably, this would be constitute sufficient ground for justifying the extension of EC Law on the free movement of workers (and of persons in general terms) to refugees

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representatives of the governments of the Member States of the European Communities, meeting within the Council, concerning nationals of third countries who are of Greek origin and language, OJ C 210/1, of 22/8/1985.

[88] Quoted supra.

[89] Idem, Article 7(1).

[90] Ibidem, Article 7(2).

[91] The meaning of the expression "in the same circumstances" is established in Article 6 of the Convention, which states that it "implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of the requirements which by their nature a refugee is incapable of fulfilling". Note, meanwhile, that an equivalent rule to that of Article 17(1) of the Convention is provided in Article 18 for self-employed persons and Article 19 for liberal professions. See also with Article 24, providing for equal treatment with nationals on labour legislation and social security.

[92] See, e.g., Article 34 of the Convention, on facilitation of the naturalisation of refugees.

residing for more than three years in a Member State. This is the period which is often required by the Convention to equalise the legal status of refugees with that of nationals of the country of residence.

e) The issue of "Community preference"

It is often considered that there is a principle of Community preference in access to jobs in Member States. According to this principle, workers who are nationals of Member States would have precedence in access to jobs, over workers who are third country nationals. In my view, this is not an entirely accurate assessment of the Community rules in force.

(i) the legal regime in force

The relevant provisions in this respect are the Treaty provisions on the free movement of workers and Regulation 1612/68.

The Treaty provisions only establish a principle of equality of treatment among nationals of Member States[93] and include no requirement that nationals of a Member State have preference over third country nationals.[94] On the other hand there is Regulation 1612/68, which is less simple to be analysed in this respect. It governs freedom of movement of workers in the Community and provides for the clearance of vacancies and applications for employment in Member States, so that workers who are nationals of one Member State may go to work in another Member State. The Regulation establishes that these workers

> "have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State."[95]

To facilitate the movement of workers within the Community, the Regulation establishes that the "specialist service" of each member State shall "regularly" send to other Member States "details of vacancies which could be filled by nationals of other Member States" and

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[93] See Article 48(2), according to which freedom of movement for workers "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment." Article 48(3) provides that such freedom shall also entail the right "to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action".

[94] Kapteyn & Verloren Van Themaat recall that "[f]rom the start it has been disputed whether a Member State is entitled to confer on workers from third countries an equal right to equal treatment to that of workers from other Member States. Indeed, it can be argued that Article 1(2) of Regulation 1612/68 appears to presuppose priority of workers from the Community, but without prescribing it. It is submitted that even the Treaty does not prohibit the extension of the abolition of any discrimination based on nationality to nationals of certain third countries." See Kapteyn, P.J.G. & Verloren Van Themaat, P., *Introduction to the Law of the European Communities*, 2nd.ed., Deventer, Kluwer, 1989, p.415. Article 1(2) of Regulation 1612/68 is referred to in the subsequent remarks in the main text.

[95] Article 1(2) of Regulation 1612/68, quoted supra. This rule is an elaboration of the right provided in Article 1(1) of the same Regulation, according to which "[a]ny national of a Member State, shall have the right to take up an activity as an employed person, and to pursue such activity within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State."

also "of vacancies addressed to non-Member States".[96] When another Member State has available manpower for any of such vacancies, its services communicate the details of suitable applications for employment to the services of the first Member State - the one where the vacancies exist.[97] The applications for employment, made by those who have formally expressed a wish to work in another Member State, have to "be responded to by the relevant services of the Member States within a reasonable period, not exceeding one month."[98] According to the Regulation, when they process those applications,

> "The employment services shall grant workers who are nationals of the Member States the same priority as the relevant measures grant to nationals vis-à-vis workers from non-Member States."[99]

Furthermore, it is also provided that

> "The Member States shall examine with the Commission all the possibilities of giving priority to nationals of Member States when filling employment vacancies in order to achieve a balance between vacancies and applications for employment within the Community. They shall adopt all measures necessary for this purpose."[100]

Finally, Article 42(3) establishes that Regulation 1612/68 shall not affect the obligations of Member States arising out of:

> " - special relations or future agreements with certain non-European countries or territories, based on institutional ties existing at the time of entry into force of this Regulation; or
>
> - agreements in existence at the time of the entry into force of this Regulation with certain non-European countries or territories, based on institutional ties between them."

It is interesting to note that, before being amended in 1992,[101] Regulation 1612/68 established slightly different rules for processing applications for employment coming from another Member State. First, it was provided that vacancies for employment would be communicated at least monthly to other Member States. However, the vacancies to be communicated were "vacancies unfilled or unlikely to be filled by manpower from the national labour market".[102] Such reference to the national labour market disappeared with

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[96] Article 15(1) (a) and (b) of Regulation 1612/68. The last sentence of Article 15 provides that the "specialist service of each Member State shall forward this information to the appropriate employment services and agencies as soon as possible." The "vacancies which could be filled by nationals of other Member States" are defined in Commission decision of 22 October 1993 creating EURES, OJ L 274/32 of 6/11/93. They are "vacancies more likely to be filled if advertised at Community level, as more quality applications will be received", see point 2.1.1. of that decision and its Annex II. The European Parliament had proposed that these vacancies be communicated to other Member States, "at the express request of the employer". This was not adopted by the Council. See the Legislative Resolution of the European Parliament adopted on 11 March 1992, doc.ref. A3-84/92, OJ C 94/205, of 13/4/1992.

[97] Article 16(1). Before the amending Regulation of 1992 (Regulation 2434/92 of 27/7/1992, OJ L 245/1, of 26/8/92) this rule was provided by the first sentence of Article 16(2).

[98] Article 16(2) and Article 15(1)(c).

[99] Article 16(3).

[100] Article 19(2).

[101] By Regulation 2434/92 of 27 July 1992, OJ L 245/1, of 26/8/92.

[102] See the previous version of Article 15 (1)(a) of Regulation 1612/68 (emphasis added). A similar reference was made by the previous version of the first sentence of Article 16(1).

the amending Regulation of 1992.[103] Secondly, before 1992, Regulation 1612/68 provided for what could be called a priority period for workers of other Member States, as regards the processing of their applications by the employment services of the Member State with the vacancies. During the 18 days after the date in which the other Member State received the communication of the vacancies, the first Member State (the one with vacancies) had to submit the applications for employment "to employers with the same priority as that granted to national workers over nationals of non-Member States."[104] During those 18 days the employment vacancies could not be communicated to "non-Member States".[105]

Two exceptions were provided to this priority period. First, in general terms, the Member State with the vacancies could consider that for the occupations in question, there were "insufficient workers available" who were nationals of the Member States". In that case, that Member State could communicate the vacancies to third countries.[106] Secondly, in exceptional cases defined in detail, the Regulation also authorised that the available vacancies not be communicated to other Member States, and instead be offered to "workers who are nationals of non-Member States".[107] It may be assumed that the reference made by this second exception to third country national workers was meant to concern workers who were in third countries. This may be concluded from the fact that the possibilities of hiring third country national workers related, for example, to "the recruitment of homogeneous groups of seasonal workers", and to vacancies offered by employers to workers residing in regions adjacent to "the frontier between a Member State and a non-Member State.[108]

On the other hand, two relevant aspects of the regime of the Regulation on processing vacancies and applications for employment were not changed by the amending Regulation of 1992. Before and after 1992, Member States were generally required to examine with the Commission,

> "all the possibilities of giving priority to nationals of Member States when filling employment vacancies in order to achieve a balance between vacancies and applications for employment within the Community."[109]

They were also required to adopt all necessary measures to achieve this purpose.[110] Likewise, before and after 1992, Article 42(3) of the Regulation 1612/68 provided that the latter does not affect obligations of Member States arising out of "relations or agreements with certain non-European countries or territories, based on institutional ties between them."

As mentioned above, the rules presently in force provide in general terms that each member State shall "regularly" send to other Member States "details of vacancies which

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[103] According to Article 1(3) of the amending Regulation 2434/92, quoted supra.
[104] Second sentence of Article 16(2) of Regulation 1612/68, in the version in force before the amending Regulation of 1992.
[105] Idem, last sentence.
[106] Ibidem.
[107] Article 16(3) and Annex to the Regulation 1612/68, in the version of the latter previous to the 1992 amending Regulation.
[108] See Article 16(3)(b) and (c) in the version previous to the 1992 amending Regulation.
[109] Article 19(2).
[110] Article 19(2), in force before and after the 1992 amending Regulation.

could be filled by nationals of other Member States" and also "of vacancies addressed to non-Member States".[111] There was also a change concerning the obligation to submit the employment applications "to employers with the same priority as that granted to national workers over nationals of non-Member States."[112] While before 1992 this obligation lasted only 18 days, since 1992 it applies with no temporal limitation.[113]

(ii) assessment and interpretation of the legal regime[114]

In order to clarify the legal regime in force (and also the one previous to 1992) it is useful to distinguish between priority in access to employment, in general and absolute terms, and priority in the processing of applications for employment, which is only one of the instruments of access to employment. In this respect, Regulation 1612/68 seems to establish, at most, a priority (in favour of nationals of a Member State over third country nationals) in the processing of applications for employment and not a priority in access to employment as such. As far as priority in access to employment is concerned, the Regulation repeats the EC Treaty principle of non-discrimination regarding nationals of the host Member State. It is submitted that any priority in the processing of applications must be understood in light of this non-discrimination principle. To complete the clarification of the legal regime, one may also distinguish between priority of nationals of Member States (in access to employment or in processing applications for employment) over third country national workers who are residing in the host Member State, or over those who are residing in a third country.

As far as access to employment is concerned, it is submitted that the present legal regime provided for in Regulation 1612/68 does not establish an obligation to give priority in the access to employment to workers who are nationals of another Member State and who come to work in the host Member State, over third country national workers who are already residing and working in the latter Member State. It is never established that employers have to give priority in access to employment to nationals of other Member States over third country national workers authorised to work in the host Member State. What is established is that Member States are obliged to give to workers who are nationals of other Member States the same priority in access to employment that nationals of the host Member State have.[115]

However, it may simply be the case that workers who are nationals of the host Member State do not have priority in access to employment over third country national

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[111] Article 15(1) (a) and (b) of the present version of Regulation 1612/68.

[112] Second sentence of Article 16(2) of Regulation 1612/68, in the version in force before the amending Regulation of 1992.

[113] Furthermore, as mentioned supra, and contrary to what happened before, after 1992 there is no mention that the vacancies to be communicated to other Member State were "vacancies unfilled or unlikely to be filled by manpower from the national labour market". See the previous version of Article 15 (1)(a) of Regulation 1612/68 (emphasis added).

[114] A rather detailed analysis of the legal regime previous to 1992 is made by Lanfranchi, M.-P., *Droit Communautaire et Travailleurs...*, op.cit., pp.185-201.

[115] Article 1(2) of Regulation 1612/68.

workers previously admitted to work in that Member State. An equality in access to employment may derive from international agreements concluded by the host Member State with third countries.[116] Furthermore, it may also be the case that in the national law of the relevant host Member State there is a principle of equality of treatment between nationals of that state and third country nationals residing therein. This equality principle may apply, inter alia, to access to employment of third country nationals who reside in that Member State and who already have the right to work in that Member State. That equality principle may even be enforceable against employers. Moreover, such a principle may derive from Community Law itself. That is the case with Turkish workers, who in this respect may be protected by EC Law. The Decision 1/80 of the EC-Turkey Association Council provides that, after four years of legal employment in a Member State, Turkish workers "duly registered as belonging to the labour force of [that] Member State", may have access to employment there in equal conditions to those of workers who are nationals of the Member States of the Community.[117]

In case a principle of priority over third country national workers does not exist as regards nationals of the host Member State, such a priority cannot apply to nationals of other Member States either. All that can exist, and all that Regulation 1612/68 and the EC Treaty require is that there will not be discrimination between nationals of the host Member State and nationals of other Member States.[118]

Furthermore, in Regulation 1612/68, the practical as well as the legal strength of a principle of priority (in access to employment of nationals of other Member States over third country nationals) seems to be questionable even when third country nationals are living in a third country. To a certain extent this is demonstrated by the existence of the "Resolution on limitations on admission of third country nationals to the Member States for employment".[119] This resolution is a non-legally binding document adopted in the

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[116] That is the case, inter alia, with Denmark and citizens of the other countries of the Nordic Union and with Portugal and Brazilians, particularly those benefiting from the regime of equality of rights, which includes also a partial equality of voting rights. As far as Denmark is concerned, it may be noted that in Germany et al. v. Commission case, on the Commission's decision on concertation of migration policies, the Danish government contested the principle of Community preference as such. See joined cases 281, 283 to 285 and 287/85, Germany et al. v. Commission [1987] ECR 2303, at 3218. Note also that no reference was made in the Portuguese accession Treaty to Article 42(3) of Regulation 1612/68. Therefore, it may be presumed that such rule is in force as far as Portugal is concerned.

[117] Third indent of Article 6(1) of the decision. Moreover, under the EEA Agreement nationals of Norway and Iceland are assimilated to national of Member States of the European Union, inter alia, for the purposes of free movement of workers.

[118] Note also the reference in the Preamble of Regulation 1612/68 to the fact that the principle of non-discrimination between "Community workers" entails that all nationals of Member States have the same priority as regards employment that is enjoyed by national workers"(sixth considerandum), as well as the reference to equality in priority "on the labour market" between nationals of other Member States and nationals of the host Member State (third considerandum of amending Regulation 2434/92). On the contrary, the Preamble of both Regulation 1612/68 and 2434/92 do not refer to priority over third country national workers.

[119] For its content see the Press Release of the General Secretariat of the Council, PRES/94/128 (20.6.1994); and also Agence Europe, No.6255 (n.s.), 20/21 June 1994, pp.7-8 and No.6259 (n.s.), 25 June 1994, p.11; and CELEX PRES/94/252. This resolution does not apply to third country nationals legally resident in a Member State "on a permanent basis" who do not have the right of entry and

framework of intergovernmental cooperation. It states that Member States will consider requests for admission into their territories for employment:

> "only where vacancies in a Member State cannot be filled by national and Community manpower or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market".[120]

If an absolute priority over third country nationals residing in a third country is doubtful, a fortiori it is even more so as regards third country nationals residing in the host Member State.

As far as priority in the processing of applications is concerned, it again seems that the important principle is equality with nationals of the host Member State. Article 16(3) provides that, in processing applications,

> "The employment services shall grant workers who are nationals of the Member States the same priority as the relevant measures grant to nationals vis-à-vis workers from non-Member States."

This confirms my assessment that the applicable principle is equality with nationals of the host Member State, and not necessarily priority over third country national workers residing in the host State. Naturally, there is also Article 19(2), imposing an obligation for Member States and the Commission to examine "all the possibilities" and take all measures necessary for

> "giving priority to nationals of Member States when filling employment vacancies in order to achieve a balance between vacancies and applications for employment within the Community."[121]

Nevertheless, this rule is not an imperative principle, being at most an obligation to act. More importantly, this rule should not be construed to mean an absolute priority over third country national workers resident in the host Member State. It should be seen more as an attempt to avoid that Member States make recourse to the labour force of third countries. The reference in the above quoted Article 19(2) to balance "within the Community" constitutes grounds for sustaining this view. Besides, this view is further reinforced by the reference in Article 15(1) to communication of vacancies addressed to

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residence in another Member State. The Council agreed to examine at a later date matters related with the admission of such persons to another Member State. See chapter 8, section B, for an examination of this resolution.

[120] To ensure that Community workers are indeed not available, Member States will make use of the EURES system. This is the network of European Employment Services responsible for exchanging information on clearing vacancies and applications for employment, created by the Commission decision of 22 October 1993, which implemented Part II of Regulation 1612/68, as amended in its second part by Regulation 2434/92, quoted supra.

[121] See also the Commission decision of 22 October 1993 creating EURES, namely the last sub-indent of the last indent of its point 2.1.2.2.; its point 2.2.1.; its point 2.2.2.; the second indent of point 2.3.2.2.; and the last sub-indent of its point 7.1. This Commission decision seems to be based above all on Article 44 of the Regulation 1612/68, which provides that the "Commission shall adopt measures pursuant to this Regulation for its implementation." Thus, the assessment made in the main text on the rules on priority of Regulation 1612/68 seems to have to be applied also to this Commission decision.

non-Member States.[122] In any case, it may be recalled that Article 19(2) is also subject to the reservation clause of Article 42(3), which excludes the application of the Regulation if it is incompatible with the above mentioned agreements with non-European countries or territories.[123]

A final reference must be made to the situation of Turkish workers in the context of priority in access to employment in the Community. The legal position of Turkish workers in the Community is regulated by the EC-Turkey Association Agreement and by the decisions of the EC-Turkey Association Council.[124] The relevant rule for this purpose is now Article 8 of Decision 1/80 of that Association Council. Article 8(1) provides that, in certain circumstances, Member States "shall endeavour(...) to accord priority to Turkish workers". This priority will be accorded when a Member State authorises a call on third country national workers, when it is not possible to meet an offer of employment in the Community "by calling on the labour available on the employment market of the Member States". This seems to refer to a priority when recruiting labour force residing in third countries, which contrasts with Article 8(2) apparently referring to priority within the workers residing within the Community". This Article provides that, when the "duly registered Community labour force" has not been able to fill vacant positions registered in the employment services of the Member State, these services "shall endeavour to fill" them "with Turkish workers who are registered as unemployed and legally resident in the territory of that Member State."[125]

Therefore, there is a kind of secondary preference for Turkish workers when filling vacancies by employment services of the Member States. However, the obligation of

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[122] Note also the reference in the last sentence of Article 16(2) of Regulation 1612/68 (in the version in force before the amending Regulation of 1992) that vacancies could not be communicated to third countries. It was not established that vacancies could not be filled by third country nationals residing in the host Member State. In this respect see Böhning & Stephen, according to whom the priority established in old Article 16(2) in processing applications for employment "accords with the general EEC view that workers from within the EEC should fill jobs before any non-EEC nationals are brought in from outside." See Böhning, W.R. & Stephen, David "The EEC and the Migration of Workers", London, Runnymede Trust, 1971, p.22. Likewise, Campbell refers that the priority established in (the old version of) Regulation 1612/68 is a "priority over applications from workers from outside the Community". See Campbell, A., *Common Market Law*, London, Longman, 1969, p. 45. See also Falchi, op.cit., pp.17-9; Heide, H. "The Free Movement of Workers in the Final Phase", *CMLRev*, Vol.6, 1968-9, pp.466-477, at 472; Lewin, K. "The Free Movement of Workers", *CMLRev*, Vol.2, 1964-65, pp.300-324, at 312.

[123] It could be said that this is an example that, in more general terms, in the light of the relevant national, Community or international law, it may happen that there are no "possibilities" to grant that priority to nationals of Member States when filling employment vacancies. This, is, naturally, subject to the principle of primacy of Community Law. But this principle will only function within the limits of the specific behaviour required by EC Law.

[124] See next chapter for more details.

[125] Note the third recital of decision 1/80 of the EC-Turkey Association Council: "[w]hereas, in the social field, and within the framework of the international commitments of each of the Parties, the above considerations make it necessary to improve the treatment accorded to workers and members of their families(...)". A Council statement concerning this recital and Article 8 of the decision, declares that "(...) the 1954 Nordic Labour Market Agreement is an international commitment such as is mentioned in the 3rd recital to the Association Council Decision. The Council notes that Article 8 of the Decision does not affect Denmark's obligations under the Nordic Labour Agreement".

Member States is that they "endeavour to fill" vacancies with those Turkish workers. Nothing more.[126]

As a way of conclusion it is submitted that Regulation 1612/68 only guarantees priority of workers that are nationals of other Member States over third country national workers in a quite limited scope. Priority in access to employment exists only insofar as nationals of the host Member State have such priority over third country nationals. In legal terms this priority may be quite limited, particularly as far as third country national residents in the host Member State are concerned. Furthermore, priority in the processing of applications for employment only exists within the limits of the functioning of the system of clearance of vacancies, as provided by the Regulation itself.

In this respect it seems inaccurate to speak of a principle of Community preference, which would favour nationals of Member States over any third country national in access to the Community labour market.

2 - Rights in the Framework of the Right of Establishment and Free Provision of Services

a) Establishment

Article 52 of the EC Treaty[127] envisages the abolition of "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State." Therefore it applies only to nationals of one Member State. Meanwhile, Article 58 provides, that, for the purposes of the Treaty rules on freedom of establishment,

> "Companies or firms formed in accordance with the law of a Member State and having their registered, central administration or principal place of business within the Community shall (...) be treated in the same way as natural persons who are nationals of a Member State."

Therefore, one way in which third country nationals may benefit from the freedom of establishment is to found a company in a Member State according to the laws of the latter. Such a company will be entitled to set up agencies, branches or subsidiaries in the territory of another Member State.[128] Community Law only requires that its activity "shows a real

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[126] Note also that, as mentioned supra, in its "Medium Term Social Action Programme" for 1995-1997, the Commission announced it plans to present in the first half of 1996 a recommendation to the Member States inviting them to give employment priority to "third country nationals permanently and legally resident in another Member State when job vacancies cannot be filled by EU nationals or nationals of third countries legally resident in the Member State concerned." See COM (95) 134, of 12/4/1995, point 3.3.5.

[127] As well as the stand still provision of Article 53.

[128] According to Article 52 of the EC Treaty. Note that under the framework of Article 220 of the EEC Treaty a EEC Convention on the Mutual Recognition of Companies was drafted, signed in 29 February 1968, in Brussels (see Bull. EC Supp.2/69). It contained a Protocol (signed in Luxembourg on 3 June 1971) which empowered the Court of Justice to give preliminary rulings on its interpretation, OJ L 204/28. It never entered in force, as it was only ratified by 5 Member States. Previous attempts at an international recognition of legal persons also failed. That was the case of the European Convention on the Establishment of Companies, concluded in the framework of the Council of Europe, in Strasbourg, in 20 January 1966 (ETS, No.57) and the "The Hague Convention concerning Recognition of the Legal

and continuous link with the economy of a Member State or of an overseas country or territory". However such "a link shall not be one of nationality, whether of the members of the company or firm, or of the persons holding managerial or supervisory posts therein, or of the holders of the capital, who wish to set up agencies, branches or subsidiaries in a Member State."[129]

As we can see, Community Law conditions for a legal person to benefit from the rules on freedom of establishment are not very demanding. There is absolutely no control on the nationality or on the residence of the owners of the capital, nor even on the origins of the latter.[130]

Nevertheless, when recruiting employees, the companies are subject to the national laws (of the Member State of the new establishment) such as those pertaining to immigration, residence and access to the labour market. It may happen that an enterprise benefiting from freedom of establishment has among its employees a third country national worker. However, there is no explicit Community rule granting this type of worker the right to go and live in another Member State to work for the enterprise. Such a Community right does not even exist for the managers of the enterprises, in cases where they are third country nationals.[131] They are not granted the right to go there even on a "temporary basis", e.g. for assisting in the establishment of a subsidiary. This impossibility is not consistent with the possibility of movement allowed to (third country national) workers of an enterprise that provides services.[132] It seems obvious that the ruling of the Rush Portuguesa and Van Elst cases,[133] to be examined below, should apply to the right of establishment also.[134] Neither does that impossibility seem consistent with Article 54(2)(f) of the EC Treaty, which requires the "progressive abolition of restrictions on freedom of establishment", namely in what relates to

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Personality of Foreign Companies, Associations and Foundations", from 1956 (Hague VII, RCH p.16, 1 AJCL 277). Neither have ever entered into force, due to lack of a sufficient number of ratifications.

[129] Title I (on the beneficiaries) of the General Programme for the Abolition of Restrictions to the Freedom of Establishment, OJ 2/36 of 15/1/62. The General Programme has no binding legal force, but in the case Thieffry it was considered by the Court to give "useful guidance for the implementation of the relevant provisions of the Treaty, case 71/76 [1977] ECR 765, at 777.

[130] As referred by Burrows, "for the purposes of applying Article 52 to companies, Article 58 either replaces all considerations as to nationality or spells the sole test of nationality that is to be applied for the purposes of both Articles." In his view, the conclusion quoted is the more consistent to the Court of Justice's doctrine according to which fundamental freedoms of movement should not be narrowly interpreted. See Burrows, F. *Free Movement in European Community Law*, Oxford, Clarendon Press, 1987, pp.182-183, where a more general analysis of the issue of the nationality of the legal persons is made. See also Cath, Inne G. F., "Free Movement of Legal Persons", in *Free Movement of Persons in Europe: Legal Problems and Experiences*, T.M.C. Asser Institute Colloquium on European Law, Session XXI, 1991, Schermers, H.G. et al. (eds.), Dordrecht, Martinus Nijhoof, 1993, pp.450-471.

[131] Not even for a limited period of time, like in the beginning of the activity of the enterprise in the new Member State.

[132] Under the EC rules on free provision of services, the employees of a provider of services (even if they are nationals of third countries) have the right to go to another Member State to work there for the clients of their enterprise, even if only on a "temporary" basis. See infra in the main text.

[133] Case C-113/89, Société Rush Portuguesa V. Office National d'Immigration, [1990] ECR I-1417.

[134] See Peers, S. "Indirect rights for third country service providers confirmed", *CMLRev*, Vol.20, 1995, No.3, pp.303-9, at 308.

"the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory post in such agencies, branches or subsidiaries...".

Finally, the right of third country nationals to move for the purposes of establishing or helping to establish a company in another Member State would be consistent with an identical right included for "key personnel" of companies, which is granted by the Europe Agreements and Partnership Agreements, as explained in chapter 5.

Another point of interest is that third country nationals are not covered by the scope of Article 221, which establishes that :

"(...)Member States shall accord nationals of the Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 58(...)".

This leads us to a rather curious situation, as it is accepted that this provision applies also to legal persons, in the sense of Article 58.[135] If third country nationals own or control such a legal person, they may use this position to benefit from Article 221. Yet, if they want to buy, for themselves, a part of the capital of a company in another Member State, they do not have a Community right to do so.

b) Services

(i) general

Article 59 of the EC Treaty provides that:

"1. Within the framework of the provisions set out below, restrictions on the freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

2. The Council may, acting by qualified majority on a proposal from the Commission, extend the provisions of the chapter to nationals of a third country who provide services and who are established within the Community."

The first paragraph seems to make clear that only nationals of a Member State may benefit from free movement as providers of services. The second paragraph of the article might have changed this situation, but no measures based on it have yet been adopted.[136] The original version of the provision was amended by article 16(3) of the Single European

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[135] See Bischoff, J.-M., comentary to Article 221, in *Traité instituant la CEE - commentaire article par article*, Kovar,R. & Constantinesco,V. et al. (eds.), Paris, Economica, 1992, p.1386; Smit, H. & Herzog, P., *The Law of the European Economic Community - A Commentary on the EEC Treaty*, 6 vol., New York, Mathew Bender, 1984, No. 221-06; and Thiesing, Jochen, commentary to Article 221, No.6, Groeben et al (eds.) *Kommentar zum E.W.G.-Vertrag*, 2nd. vol., 3rd. ed., Baden-Baden, Nomos-Verlag, 1983.

[136] It could appear that this provision would be useful within the framework of relations with third countries. The Union could give rights to nationals of third countries and those countries could do the same to nationals of a Member State. However, these issues will probably be dealt with under the legal framework of Article 238 of Association Agreements of the Community. That was the case of the EEA Agreement, analysed in Chapter 5.

Act, which changed the previous requirement of unanimity to a qualified majority in the voting procedure. However, to date, this change has not been sufficient in bringing about the approval of the envisaged measures on third country nationals.[137] In any event, given the wording of paragraph 2 of Article 59, it seems clear that those measures could only apply to third country nationals who are providers of services.

In any case, to make a general analysis of the position of third country nationals from the perspective of the rules of the free movement of services, it is interesting to refer to the different situations which may arise. Two parameters are used. One is the nationality of the persons involved, i.e., whether the persons concerned are nationals of a Member State or are nationals of a third country. The second is whether there is a need of physical movement of persons for the service to exist.

In a **first** group we can consider the situations where both the provider and the recipient of services are nationals of a Member State. As long as an inter-state element exists, these situations are under the scope of Community Law. Both the provider and the recipient have rights protected by Community Law.

In a **second** group we have the situation where both the provider and the recipient of services are nationals of third countries. The relations between them may have an inter-state element and may be completely legal under the national laws of the Member States involved. However, those relations are completely outside the scope of Community Law.

There is a **third** group which covers the situation where one of the persons involved is a national of a Member State and the other is a third country national.[138]

The legal position of nationals of a Member State in such a relationship appears to be quite clear. It seems only logical to sustain that they shall benefit from all Community rights granted to a provider or recipient of services.[139] No rule of free movement of

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[137] See however that the Commission proposed that Article 59(2) be one of the legal bases of a draft Council second Directive on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of freedom to provide services, OJ C 32/2 of 12/2/1976. Article 15 of that draft Directive would make that instrument applicable to "agencies and branches established within the Community and belonging to undertakings whose head office is outside the Community which are subject to and which satisfy the provisions of Title III of the first coordinating Directive." The Council did not adopt this provision, nor did it accept the Commission's suggestion of using Article 59(2) as part of the legal basis of the Directive. This must have been the reason why the Commission proposal for a third Directive in the same field (as well as the final version of such Directive as adopted by the Council) did not mention that provision anymore.

[138] Nationals of a Member State, or third country nationals, here would include legal persons: companies or firms in the sense of Article 58, by reason of the reference made by Article 66.

[139] Oliver, op.cit., p. 87, footnote 109, sustains that "a Member State may not restrict the rights of a person wishing to receive services under Article 59 by requiring him to prove that the person providing them is a national of a Member State. He invokes, "generally", case 199/82, Amministrazione delle Finanze dello Stato v. San Giorgio [1983] ECR 3595. See, however, that in the same page, in the main text, Oliver states that: "The right to receive services under the Directive does not extend to services provided by non-Community nationals: these are not services carried out in accordance with Community Law. Accordingly, the families of recipients of such services derive no right from the Directive." He was referring to Council Directive 75/34/EEC, concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, OJ L 14/10 of 20/1/75.

services distinguishes the rights of nationals of a Member State, on the basis of whether the receiver or the provider of the services is or is not a national of a Member State.

Third country nationals, themselves, do not have a Community right to receive or provide services in relation to nationals of a Member State who come from or simply reside in another Member State. However, the former may take indirect benefit from free movement of services when nationals of a Member State have the Community right to receive from or provide services to them.

Nevertheless, third country nationals are not protected under Community Law in their relationship with such a national of a Member State. Formally, this lack of protection is due to the fact that Community Law does not protect their relationship as such, but only the right of the national of a Member State to receive or provide services. It would even be difficult to sustain that third country nationals enjoy rights derived from those of nationals of a Member State, as do third country national relatives of beneficiaries of the free movement of persons.

The benefits which third country nationals may take from their economic relationship with a national of a Member State are, apparently, purely economic and indirect. Their position and interests are only legally protected as long as the position of the national of a Member State is protected and as long as the latter is willing to defend his or her own rights.

It is submitted that this regime is not perfect. Unless they are relatives of a national of a Member State, third country nationals are kept completely outside the scope of Community rules on services. This seems particularly questionable when, for the provision or receipt of services, third country nationals do not enter into conflict with the Member States laws on immigration and access to their labour market.

That is the case for third country nationals, residing in a Member State, who without leaving their Member State of residence, receive services from a national of a Member State residing in another Member State. It is submitted that these third country nationals should be covered by the scope of Community Law. That should be the case even when they go to another Member State to receive services there. Particularly inasmuch as they conform with the national laws regarding the entry and stay of foreigners, there appears to be no important reason for their legal position not to be protected by Community Law.

Meanwhile, according to Article 66, Article 58 applies to services and is thus applicable to the rules regarding legal persons benefiting from free movement in the Community. This means, for example, that third country nationals may set up a legal person, in the sense of Article 58, and that such a person has the Community right to provide services in another Member State.

In the field of services, we could also have to consider the possibility that legal persons be recipients of services.[140] This would seem quite normal in simple cases, such as

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[140] See also the interesting remarks of Peers, who recalls paragraph 13 of the Court's ruling in Case C-43/93, Raymond Vander Elst v. O.M.I. (France), [1994] ECR I-3803. There, the Court of Justice declared that "nationals of the Member States of the Community have the right to enter the territory of the other Member States in the exercise of the various freedoms recognised by the treaty, and in particular the

an advertising company giving advice to an enterprise located in another Member State. This may be considered to be quite a simple situation for the purposes of this analysis. However, other, somewhat more complex cases may also come under the scope of Community Law. This might be the case of a cooperative totally or partially founded by third country nationals resident in a Member State.[141] Let us imagine that the purpose of such a cooperative is to provide medical assistance to its members. Doctors of other Member States could be contracted to go and take care of the cooperative members in the State of residence of the latter. The contract between the cooperative and doctors established in another Member State would be covered by the rules of free movement of services. Under Community Law, the cooperative has the right to search in other Member States for providers of services for its members. However, the members of the cooperative, who are nationals of third countries, may also need to go to another Member State to receive treatment by doctors under contract with the cooperative. In that case it seems difficult to sustain that, in the light of current Community Law, the referred patients have a (Community Law) right to go to another Member State, simply because the cooperative is a recipient of services under Community Law.

The opposite case, that of a legal person provider of services, will be analysed thoroughly, in relation to its employees who are nationals of third countries.

(ii) Services - free provision of services and the posting of workers in another Member State

Within the framework of the freedom of services it is interesting to examine the issues regarding the work of third country national workers for enterprises of a Member State that provide services in another Member State.[142]

In the Webb case,[143] the Court of Justice dealt with the provision of manpower for another person, for hire or reward and otherwise than in pursuance of a contract of employment with that other person, for the performance of the work usually carried on in his or her undertaking. The Court ruled that such provision was a service within the meaning of the Treaty rules on free provisions of services.[144]

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freedom to provide services ... enjoyed by both providers and by recipients of services". Peers sustains that it is a "straightforward application of the Court's view of Articles 59 and 60 EC in this case" to suggest that a third country national employed by a Community company may enter other Member States as a recipient of services. See Peers, op.cit, at p.308.

[141] Let us presuppose that this legal person could be included under the scope of the definition given in Articles 52 and 58, on the characteristics of the legal persons relevant for Community Law purposes in this field.

[142] On this topic see House of Lords - Select Committee on the European Communities, "Protection of Posted Workers"(with evidence), 5th Report, Session 1992-93, London, HMSO, 1993; Robin, Sophie "L'application du droit social français aux entreprises prestataires de services établies à l'étranger", *Droit Social*, Feb. 1994, No.2, pp.127-135; Séchelles, Alain D. "Free Movement of Workers and Freedom to Provide Services - considerations on the employees of the provider of services with specific references to France", in *Free Movement of Persons in Europe...*, op.cit., pp.472-484.

[143] Case 279/80, Alfred Webb [1981] ECR 3305.

[144] Idem, paragraph 11.

One year later the Court dealt with a related problem in Seco & Giral.[145] Those two French enterprises were experts in building the infrastructure of railway networks. Both used third country national employees[146] to perform several works in Luxembourg. The authorities of this country asked the two firms to pay some social security contributions related to those employees. However, the enterprises had already paid social security contributions in France. Moreover, the workers did not receive any benefits from the enterprises' required payments to the Luxembourg's authorities. Finally, the latter did not apply the same requirement to the employees who were nationals of a Member State working in Luxembourg for enterprises from other Member States.

The argument used by the government of Luxembourg to justify the competence to ask for the payment of those contributions was that if the authorities of Luxembourg could prohibit third country nationals from undertaking paid employment in their country, a fortiori they could also impose conditions on their work there. The Court ruled out the argument of Luxembourg stating that:

> "A Member State's power to control the employment of nationals from a non member country may not be used in order to impose a discriminatory burden on undertakings from another Member State enjoying the freedom under articles 59 and 60 of the Treaty on the freedom to provide services."[147]

The Court added that:

> "Nor should such a requirement be justified if it were intended to offset the economic advantages that bringing these workers would permit to obtain."

Some years later, the French authorities began proceedings against a Portuguese company - Sociedade Rush Portuguesa Lda.[148] This building and public works enterprise concluded a subcontract to build some parts of the railway of the new "TGV Atlantique" in the West of France. To do this, it brought 58 workers from Portugal. Rush was required by "L'Office National D'Immigration" to pay some fines because its employees were not brought to France through the office's services, neither had the firm obtained for them work permits from the French authorities.

The relevant legal provisions in the case were article 341 (6) and (9) of the French "Code du Travail" and article 216 of the Treaty of Accession of Portugal and Spain. The French Code gives the "O.N.I." the exclusive right to engage foreign workers coming to work to France and imposes the obligation of having a work permit to all foreigners carrying out employed activities in the country. Article 216 of the Treaty of Accession established that articles 1 to 6 of Regulation 1612/68 did not apply to Portugal until the

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145 Case 62 & 63/81, Seco and Desquene & Giral Sa. v. E.V.I. [1982] ECR 223.

146 In the proceedings there is no reference to their actual nationality.

147 See note 23, paragraph 12, case quoted.

148 Case C-113/89, Rush Portuguesa v. O.N.I., quoted supra. On this case see "Affaire C-113/89, Rush Portuguesa", *J.D.I.*, Vol.118, 1991, No.2, pp.471-3; Gormley, Laurence, "Workers and Services distinguished", *ELR*, Vol.17, 1992, No.1, pp.63-67; Jalles, I. "Annotation to the case Rush Portuguesa", *Colectânea Anotada de Jurisprudência Comunitária (os casos portugueses)*, Lisbon, Ministério da Justiça - Gabinete de Direito Europeu, 1992, pp.204-211; Marshall, Kimberly "Case C-113/89, Rush Portuguesa", *Georgia Journal of International and Comparative Law*, Vol.21, 1991, No.3, pp.557-573 and Verschueren, H. "L'arret Rush Portuguesa: un nouvel apport au principe de la libre circulation des travailleurs dans le droit communautaire", *Revue du droit des étrangers*, 1990, No.60, p.231.

beginning of 1993.[149] Workers did not yet have a Community right to emigrate and to go to work in another Member State.[150] However, provided they were already in the latter State on the date of accession, they would benefit from the Community principle of non-discrimination.[151] Moreover, the Treaty of Accession allowed for free provisions of services between Portugal and the other Member States.

In this case, France tried to ensure that as much as possible the evaluation of the situation be made in the framework of the rules related to employed persons. France sustained that the fact that an enterprise benefits from the freedom to provide services does not necessarily mean that all its employees are providers of services. Only part of these could be considered providers of services for community law purposes, namely "Le personnel de confiance de la societé", carrying on a task typical of the managers of the enterprise who are able of undertake the society vis-à-vis other parties. Another group of employees that should not be considered normal workers would be those who perform activities as high skilled workers.

This last idea recalls the content of the then in force Article 16 of Regulation 1612/68.[152] This provision authorised that certain employment vacancies did not be communicated to the employment services of other Member States. Instead, those vacancies could be offered to workers who are nationals of non-Member States, provided the offer of employment was made to a "named worker and is of a special nature in view of: (...) the requirement of specialist qualifications(...)".[153] In the Annex of that Regulation it was specified that

> "The expression 'specialist' indicates a high or uncommon qualification referring to a type of work or a trade requiring specific technical knowledge(...)."[154]

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[149] And in relation to Luxembourg until 1/1/1995. Later on rules were changed under the impact of German reunification. See Regulation (EEC) No 2194/91 of the Council on the transitional period for the freedom of movement of workers between Spain and Portugal, on the one hand, and the other Member States, on the other hand, OJ L 206/1 of 29/7/91. Freedom of movement of workers applied equally to Portugal and Spain after 1/1/1992, except as far as Luxembourg is concerned in relation to which it applied since the beginning of 1993 only.

[150] This applies both Portuguese workers going to another Member State, and to nationals from another Member State going to Portugal.

[151] That is to say from the advantages included in Articles 7 to 12 of Regulation 1612/68 and in other relevant instruments of secondary Community Law.

[152] See supra, the analysis made on the issue of the "Community preference".

[153] Article 16(3)(a)(i) of Regulation 1612/68.

[154] Note that this expression is retaken by the rules of the Europe Agreements and of the Partnership Agreements that define the key personnel of a company which benefits from the right of establishment in a Member State. That "key personnel" can enter a Member State to work there for such companies. As far as services are concerned, in step with a general liberalisation process, some "temporary" movement of natural persons is allowed for by the Europe Agreements. It is limited to natural persons providing the service and to persons employed as "key personnel" by the company providing the service. The definition of "key personnel" is the same of that made by the Agreements for the purposes of establishment. Therefore, it is also based on the expressions used by the Annex of Regulation 1612/68 (before this annex was deleted by Article 1(8) of Regulation 2434/92 of 27 July 1992, OJ L 245/1, of 26/8/92). According to the Europe Agreements, the movement of natural persons may also include the movement of representatives of the company provider of services, when they seek temporary entry into a Member State to negotiate the sale of services, or to sell services for the company. However, such representatives may not make direct sales to the general public or supply the services themselves. See Article 55(2) of the

The Commission, as well as the Advocate General, took the side of the French government, invoking the terms used in the rules of the General Programme of 1961 for the Suppression of the Restrictions to the Freedom to Provide Services.[155] The Commission only asked the Court to define clearly the concepts of the different categories of employees, while presenting its own ideas on the subject.

However, the Court accepted the thesis of the Portuguese enterprise and government. It stated that:

> "articles 59 and 60 of the Treaty preclude a Member State from prohibiting a provider of services established in another Member State from moving freely in its territory with all its employees; or that a Member State submits this movement to restrictive conditions as if they were going to get an employment there, or to an obligation of authorisation of working."

In the Court's view, these restrictions would amount to discrimination

> "in relation to its competitors established in that host Member State, who may use freely their own personnel and would affect its ability to provide the service."[156]

According to the Court, the scope of article 216 of the Treaty of Accession was only the prevention of perturbations in the labour market with "important and sudden movements of workers."[157] The Court considered that in the situation of the case was different, since there were only temporary movements of workers, who were working in the framework of the provision of services by their employer.

> "In fact, those workers return to their country of origin after the accomplishment of their mission, without ever having access to the employment market of the host country."[158]

The Court added that such would not be the case of a company established in another Member State whose activity was to provide working force. Even if it were a provider of services in the sense of the relevant Treaty provisions, such an enterprise "carries out activities which object is precisely to make workers have access to the labour market of the host Member State."[159]

Having already decided the case in favour of the Portuguese enterprise, the Court allowed itself to be moderate. It elaborated its conclusion allowing Member States to verify that such a Portuguese company does not use the freedom to provide services as a way to circumvent article 216 of the Treaty of Accession. However, it declared that

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Community Agreements with Hungary and Poland; Article 56(2) of the of the Agreements with Czech Republic, Slovakia, Bulgaria and Romania; Article 51(2) with Estonia, Article 52(2) with Latvia and Lithuania; and Article 53(2) with Slovenia. For an analysis of this issue, see section B of chapter 5.

[155] General Programme for the Suppression of the Restrictions to the Freedom to Provide Services, adopted by the Council on 18/12/1961, OJ 32/62, of 15/1/1962.

[156] See paragraph 12 of judgment, quoted supra.

[157] Paragraph 13.

[158] Paragraph 15.

[159] See paragraph 16 of the judgment. The Webb case can be seen as different because there the workers remained under contract with the provider of services during all the period that they were working in another Member State. Clearly, the very activity of providing work force should have been distinguished from the work force itself. What the Court seems to reject in the paragraph quoted are intermediaries of labour who never actually hire workers, but just put them in contact with prospective employers.

> "Such controls have (...) to respect the limits of Community law, and namely those deriving from the concept of the free movement of services, which can not be made illusory and which use can not be submitted to the discretion of the administration." [160]

To this extent,

> "Community law does not prevent Member States from extending their legislation or collective agreements (...) to every person doing a remunerated work, even temporary, on their territory, whatever the country of establishment of the employer." [161]

This idea echoes not only (to some extent) the Seco case,[162] but also the first draft of the Community Charter of the Fundamental Social Rights of Workers.[163] Article 6 of this Charter provides that:

> "The wage conditions, as well as other social benefits relating to the wage applied in the host country, must in particular be guaranteed to workers of other EC Member States performing work for the account of a sub-contracting undertaking in the host country concerned."

This article disappeared on its way to the final version, where only a general declaration of the French Presidency in the same sense can be found.[164] This appears to be proof that the governments of the Member States prefer to remain with their present legal differences and the underlying conditions for competition (and to retain their competence on these issues), than to make those conditions uniform and avoid distortions in competition.[165]

What seems to be at stake, after all, is competition in the labour market, as far as its limits and the grounds to authorise it are concerned. The Court of Justice may have said that the Portuguese workers do not have access to the "employment market."[166] In this way the Court introduces a subtle difference between that expression and the more

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[160] Paragraph 17 of the judgment.

[161] Idem, paragraph 18.

[162] Not in the final conclusion, but as far as the reasoning of the case is concerned, see case quoted supra.

[163] The events of the Rush case occurred in January 1987, a long time before the adoption of the Community Social Charter. The Charter was adopted in December 1989 and the Court of Justice decided the case on 27 March 1990. Whether the Charter inspired the Court is uncertain, but possible. Moreover, it is likely that the Charter expresses the concerns of the French government on this type of cases.

[164] See paragraph 9 of the report of the Presidency of the European Council, annexed to the Community Charter. However, the idea was taken up again by the Commission in its Action Programme to Implement the Social Charter in what concerns the application of binding collective agreements of the host country - COM (89) 568 final, of 29/11/1989, pp. 22 and 24.

[165] The carefulness of the Member States in avoiding such a provision being part of the final draft has, however, a limited utility regarding the ruling of the Court of Justice on the matter. However there is a slight but important difference between their content. The Article of the Draft Community Charter, would impose an obligation on the enterprises, whereas the ruling of the Court allows the Member States to decide if they want to impose their rules on them. An obligation on the enterprises would also be imposed by the Commission draft Directive presented in August 1991, and amended in 1993, as mentioned below in the main text.

[166] This is mentioned in paragraph 15 of the Rush Portuguesa case as "marché de l'emploi", although it is translated in the English versions of the Rush Portuguesa case and of the Van Elst case as "labour market". Thus, in the English version the subtle distinction of the Court between employment and labour market is simply lost, apparently without any major linguistic justification. Cf. also the Court's Proceedings, No.9/90, which translate "marché de l'emploi" as "employment market", idem, p.21.

used *Labour Market* concept.[167] Actually, it would have been difficult to say that workers, working in France, certainly taking the place of French or other workers resident there, are not in the French labour market. In a certain sense, the Portuguese workers were not only competing in that market, but competing successfully. Even if they were there on a "temporary" basis.

On the other hand, one could be led to say that the host countries have tackled the problem in the wrong way. They could have simply imposed their wage regulations on the work of the third country national employees, as suggested by the Court. This would not have contravened Community Law.[168]

It should be noted that the Rush Portuguesa case may be better understood if put in the framework of the events that had been unfolding in France for quite some time. For some years a legal battle evolved in the French courts between Portuguese immigrants and the French authorities. The former, claiming to be self-employed persons asked for residence permits. The rules on freedom of establishment, like those on services, had been in force since 1986, the date of accession of Portugal. Usually, however, the French authorities ("préfeture") took two or three years to answer the requests and in most cases refused them. Dozens of persons were "invited" to leave the country. Meanwhile, there were thousands of cases in Court, because the Portuguese claimed the application of article 5 of Council Directive 64/221, which provides that decisions on this matter have to be taken, at the latest, 6 months after the request. It was estimated that about 100.000 Portuguese were in this situation, 20.000 of them in Paris alone. It would not be surprising if part of them turned out to be fake self-employed persons. Yet, surely not all of them.[169]

The rigorous, and even over-zealous application of national and Community rules by the French authorities, however, cannot be regarded without some interest. It highlights the eventual practical importance of the weak or uncertain points of the Court's ruling. For example: before the Van Elst case,[170] and in spite of the Seco case, it was possible to wonder what the response of the Court of Justice would have been if the employees in question were not Portuguese, but nationals of a third country, Brazilians for instance. In any case, even now there are still some open issues. Let us imagine that a Brazilian enterprise sets up in Portugal what is a de facto branch, although legally a Portuguese

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[167] This distinction could eventually be justified as far as the provisions of the Act of Accession of Portugal on free movement of workers are concerned. However, it does not seem to be justified as far as provision of services as such is concerned.

[168] However, in practice it could be more difficult to impose such national regulations on the enterprises than to prevent third country national workers coming from another Member State from working in the host Member State. The application of such national regulations would eventually require some degree of collaboration with the public authorities by the workers, who, in this situation, are in a particularly precarious position regarding the employer.

[169] In Spain also, lawyers tried to circumvent migration laws under the provisions on the freedom of establishment. They used the concept of "comunidad de bienes" - a kind of partnership or common property on certain things or rights. Formally, this is a kind of co-operative where everyone is the owner; but in practice it may be a normal enterprise where some people control the business and the profits and the others work for them.

[170] Quoted supra and analysed infra, in the main text.

company. In a first phase it would only perform works in Portugal.[171] Later, it would try to take Brazilian employees to France and build there the railway of some line of the TGV. Could the enterprise do that? Using another activity as an example, if the enterprise worked in the field of offices and factory cleaning, could it take its Brazilian employees and go to Germany to clean the "ADIDAS" headquarters? What about if it got a public contract in Denmark for restoring some old buildings in a historical town? Could the work be performed by some of the same Brazilians? Could the enterprise later move them from there to Belgium to do a similar job? And then again to yet another destination? For how long would the "temporary movement of workers", as described by the Court be considered really temporary? This seems to be a point in relation to which the concept of service would eventually have to be better defined.

In the meantime, as planned in the Action Programme of the Commission on the Implementation of the Community Charter of Fundamental Social Rights, the Commission presented in August 1991 a draft proposal for a Directive on the minimum rights to be guaranteed to workers who are employed in a Member State and moved to another to work under a sub-contract, as part of the enterprise which "provides services."[172] This Directive would establish a set of rights that all workers would enjoy, including third country national workers. Besides establishing that the most favourable[173] labour law would apply to those workers, the draft Directive provides for the respect of their basic human rights. It establishes that they cannot be discriminated against on grounds of sex "colour, race, religion, opinions, national origin, social background or sexual orientation."[174]

The draft proposal took some time to be approved by the Commission. This was due to disagreement among the Commissioners on the period of provision of services after which the Directive would be applicable. The Commissioners from the more developed countries of the Union considered too long the period of three months proposed by their colleague Mrs. Papandreou.[175] In the beginning this was the duration of the period set, but later the proposal was amended and the period was reduced to one month only.

This draft Commission Directive is still being discussed in the Council. The same issue that was object of controversy between Commissioners (the period of work after which the Directive may be applied) is still blocking its approval by the Council. The Member States that have been most opposed to the approval of stringent rules are Ireland, Italy, Portugal and the United Kingdom, the countries from which more posted workers come from. The countries that favour more stringent rules are Germany, France, Belgium, Luxembourg, Austria and Finland. These Member States prefer the so-called zero option,

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171 And would continue to carry these out, so that the requirement of the economic link with a Member State was fulfilled.

172 See the Commission Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM (91) 230 final, SYN 346, of 1/8/1991, amended by COM (93) 225 final, SYN 346 of 15/6/1993.

173 Between the one of the country where they are employed and the one of the country where they are actually working for the time being.

174 See its Article 3(1) (b)(vii) as amended in COM (93) 225 final - SYN 346, p. 13. See "Posted workers draft strengthened", *E.I.R.Rev.*, 1993, No.236, pp.22-24;

175 Who in this aspect was supported by southern European countries, including Portugal.

that is: of applying the Directive on the very first day of employment in the host Member State.[176] Meanwhile, in view of the delays in the adoption of the draft Directive of the Commission, Germany has even prepared legislation designed to implement rules similar to that of the draft Directive.[177]

After the presentation of the Commission's draft Directive of the Commission, in the Vander Elst case,[178] the Court of Justice confirmed its ruling of the Rush Portuguesa case. The new case concerned a Belgian citizen, Van Elst, who provided demolition services. He sent eight of his employees, including four Moroccans legally resident in Belgium, to work for one month in Reims, in France. The Moroccans workers had entry visas to France, but not French work permits. The French authorities charged Van Elst with violation of the relevant French Law, which obliges enterprises in that situation to obtain working permits for third country national workers from the French national immigration office and to pay a fee for the services rendered. He was also fined 30.000 French francs for not having done so.

The Court ruled that Articles 59 and 60 of the EC Treaty prohibits Member States from requiring an enterprise of another Member State to obtain working permits for its third country national workers from a national immigration body and to pay to that body a fee for the services rendered, before sending those employees to provide services in that Member State. The Court added that imposing an administrative fine on the employer who does not fulfil such requirements was in violation of Community Law.

While this ruling does not seem to change the Rush doctrine much, it is interesting to analyse some of its aspects. The Court ruled that the payment of the sums (and fines) requested by the French authorities to Van Elst could constitute a substantial economic burden to his enterprise.[179] Then, the Court recalled its doctrine on restrictions of provision of services, in general. It stated that Article 59 of the EC Treaty requires not only the elimination of any discrimination, on the grounds of nationality, against a provider of services established in another Member State, but also the abolition of any restriction to such freedom, even if it is equally applicable to national providers of services and to those of other Member States. For this restriction to be forbidden by Article 59, it would be sufficient that it was liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he or she lawfully provided similar services.[180]

The Court added that, as one of the fundamental principles of the EC Treaty, freedom to provide services may be restricted only by rules which

> "are justified by overriding reasons in the general interest and are applied to all persons and undertakings operating in the territory of the State where the service

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176 *MNS*, 4, 6 & 7/1995.

177 It is estimated that in Germany there are some hundreds of thousand of illegal construction workers, almost half of which would be nationals of a Member State. See *MNS*, 7/1995.

178 Case C-43/93, Vander Elst v. O.M.I. , quoted supra. This case is analysed by Peers, op.cit.

179 Paragraph 12 and 15, recalling the Seco and Säger cases in the latter paragraph. In the Säger case, the Court ruled that national legislation which submits the provision of services in the national territory, by a enterprise established in another Member State, to the issue of an administrative authorisation constitutes a restriction to free provision of services. See case C-76/90, Säger [1991] ECR 4221, paragraph 14.

180 Paragraph 14.

> is provided, in so far as the interest is not safeguarded by the rules to which the provider of such service is subject in the Member State where he is established(...)".[181]

Furthermore, as the Court added,

> "(...) a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions whose object is to guarantee the freedom to provided services".[182]

In this light, the Court considered that the requirements demanded by the French government to Van Elst were contrary to Articles 59 and 60 of the EC Treaty, since they did "go beyond what may be laid down as a precondition for the provision of services".[183] The Court justified this by noting several points.

First, the Moroccan workers employed by Van Elst who worked in France for one month, were lawfully resident in Belgium, where Van Elst himself was established, and had work permits issued by that country.[184]

Secondly, the Court recalled that the short-stay visas held by the Moroccan workers, issued by the French government, "constituted valid documents permitting them to remain in France for as long as necessary to carry out the work". The Court concluded that

> "Consequently, the national legislation applicable in the host State concerning the immigration and residence of aliens had been complied with".[185]

This is, in my view, a problematic statement, to put it mildly. It seems to be clear that, if the Moroccan workers had told the responsible French services that they wanted the visas to go to work in France for one month, they probably would not get those visas. Contrary to what the Court mentioned, the French immigration legislation was not complied with, because the workers could not enter the country with short term visas if, from the beginning, they had the intention of working there. This consideration of the Court also raises another issue: was it relevant for the decision of the case that the French government issued visas to the Moroccan workers? It seems difficult to sustain so. If Van Elst has the right to send third country national workers to France to provide services there, it should make no difference whether the workers were granted French entry visas, as it makes no difference whether they were granted French work permits.[186] Thus, the

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[181] Paragraph 16 of the judgment. As Peers recalls, the case-law of the Court concerning measures which are "equally applicable" to foreign and domestic service providers, accepts that such measures "can justify restrictions on free movement of services only where the restrictive effects are necessary and proportional to the aim of the legislation, where the subject has not been the issue of Community harmonisation measures, and where mutual recognition of other Member States' rules is not feasible. See Peers, op.cit., p. 304. See, generally, O'Leary, S. & Fernández Martín, J.M., "Judicial Exceptions to the Free Provision of Services", *European Law Journal*, Vol.1, 1995, No.3, pp.308-329.

[182] Paragraph 17.

[183] Paragraph 22.

[184] Paragraph 18.

[185] Paragraph 19.

[186] It follows from this that France should be considered to be under a duty to issue the necessary visas. See Peers, op.cit., p.307.

Court's consideration of this aspect seems to be more a sort of political argument than a legal one.

The third point mentioned by the Court is related to the work permits, which, as the Court recalled, are required by French law for any undertaking established in that country, whatever the nationality of the employer. In the words of the Court,

> "Such a system is intended to regulate access to the French employment market for workers from non-member countries"[187]

However, in the view of the Court

> "Workers employed by an undertaking established in one Member State who are temporarily sent to another Member State to provide services do not in any way seek access to the employment market of in that second State, if they return to their country of origin or residence after completion of their work. (...) Those conditions were fulfilled in the present case."[188]

To some extent the Court repeats here its ruling in the Rush Portuguesa case. It is true that in the Van Elst employees did work in France for one month only and did return to Belgium after that period. However, the Court did not define accurately the temporary period in which third country nationals working for an enterprise provider of services may work in another Member State. This may be relevant for future cases, particularly taking into account the fact that this type of situation has arisen several times in different Member States and that decision in a case by the EC's Court of Justice takes considerable time. Moreover, another aspect of the Rush Portuguesa ruling is also repeated here. The Court takes up again its reference to the fact that the relevant third country national workers do not seek access to the employment market of the host Member State. Arguably, in this manner the Court does not justify why those workers should be given access to the labour market of that Member State at all. Access to and competition in that labour market, in more general terms, seems to be the relevant issue here.

Finally, the Court responded to the objections of some intervening governments that the application of the French legislation was justified in the light of the aim of protecting workers and ensuring competition.[189] It pointed out that the Moroccan workers had Belgian work permits and that Articles 40 and 41 of the Association Agreement with Morocco prohibited any discrimination on the grounds of nationality between Moroccan workers and workers nationals of Member States as far as working conditions, remuneration, and social security is concerned.[190] Therefore, the Court considered that, the application of the relevant Belgian regime excluded significant risks of exploitation of workers and distortion of competition between enterprises. The Court took that conclusion referring also to the possibility that the French rules on public order be

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[187] Paragraph 20. As mentioned supra, the French version of the text of the Van Elst judgment (as the Rush Portuguesa one) refers to "marché de l'émploi", although its official English translation refers to "labour market". In the quotation, I used the "employment market" expression, which seems to me more close to the intention of the Court in its judgment.

[188] Paragraph 21.

[189] See paragraphs 24 and 25.

[190] See the next chapter for an analysis of the rules of this Agreement.

applied regarding workers posted in that country in the framework of provision of services.

The ruling of the Court of Justice in the Van Elst case seems to be more elaborate than in the Rush Portuguesa case. Besides, it is also put more into the framework of the Court's doctrine on restrictions to provision of services, while the Rush Portuguesa case dealt much with the Act of Accession of Portugal and Spain. The Van Elst ruling brought some clarification to the one in Rush Portuguesa. However, some points remain to be better defined, while the adoption of the Commission draft Directive on posting of workers is also awaited.

3 - Rights in the Framework of the Free Movement of Capital and Current Payments

The rule relating to the free movement of capital, which remained in force until 1st January 1994, was Article 67(1) of the E(E)C Treaty. It envisaged the progressive abolition between Member States of

> "all restrictions on the movement of capital belonging to persons resident in the Member States and any discrimination based on nationality or on the place of residence of the parties or on the place where such capital is invested."

It was clear that this Article applied to all residents in the European Union, whatever their nationality.[191] Furthermore, the Directives for the implementation of Article 67 also made a general reference to "persons resident in Member States", without mentioning their nationality.[192] The problem was that there was neither a Community definition of residence for general purposes, nor for the purposes of the free movement of capital. According to the Explanatory Notes of the Nomenclature annexed to the Two first capital Directives: "residents and non-residents" were the "natural and legal persons[193] according to the definitions laid down in the exchange control regulations in force in each Member State." However, this would imply an unacceptable situation, that is the existence

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[191] Furthermore, it would apply only to residents, not including nationals of a Member State who do not reside in the Union. It should be noted, meanwhile, that, as Burrows puts it: "[i]t is unusual for the Treaty to make residence rather than nationality the test, but the practical reasons for this is that national exchange control laws are usually based on residence", see Burrows, F., op.cit. at p.280. The nationality rule here would not be as effective as in other fields of free movement. In fact, it would be very easy to circumvent a rule that prohibited a third country national from sending his capital to another Member State as it would be easily to find a national of a Member State to do it for him or her. A similar situation could not happen, for example, in the free movement of workers.

[192] Article 1 of Directive 88/361/EEC of the Council for the implementation of Article 67 of the Treaty, OJ L 178/5 of 8/7/88. See also Article 2 (referring to "non-residents") and Article 7 of the same Directive, as well as Articles 1(1), 2(1) and 3(1) (all referring to residents of Member States) of the repealed First Council Directive of 11 May 1960 for the implementation of Article 67 of the EEC Treaty, OJ L 921/49 of 12/7/1960, amended by Council Directive 63/21/EEC of 18 December 1962, OJ 62/5 of 22/1/63.

[193] According to Oliver, it is obvious that these legal persons (with or without the nationality of a Member State) may be controlled by a natural or legal person who is a national of a third country. This fact cannot prevent the person residing in the Community from enjoying the rights of free movement of capital. See Oliver, op.cit., p.90.

of different definitions of beneficiaries of free movement and leaving it to each of the national legislators to decide to whom Community Law may apply.[194]

Meanwhile, in relation to current payments, the old Article 106(1) of the EEC Treaty established that when a third country national could benefit from any of the four fundamental freedoms of the EC, he or she would be allowed to make any payments or any transfers of capital and earnings between Member States. Clearly, this regime did not constitute a substantial addition to the rights of third country nationals in Community Law. It was merely a requirement for the operation of the few rights already granted to third country nationals.

After 1 January 1994 a new and simpler regime was established in what relates to free movement of capital and current payments. On that date, the new provisions on free movement of capital of the Treaty on European Union came into force. They repealed the old Articles 67 to 73 of the EEC Treaty, as well as Article 106.[195]

The new Article 73B establishes in its first paragraph that :

> "1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."

Its paragraph 2 repeats the same rule in relation to payments.

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[194] A similar situation may be found in cases Hoekstra and Levin - case 75/63, Hoekstra, born *Unger* [1964] ECR 177, and case 53/81, Levin, quoted supra. In the latter, the Court stated that the "term 'worker' and 'activity as an employed person' (...) may not be defined by reference to the national laws of the Member States but have a Community meaning. If that were not the case, the Community rules on free movement of workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by the Community institutions, by the national laws which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty." Idem, paragraph 11. Thus, Oliver suggested the use *mutatis mutandis* of Article 58 of the Treaty - Oliver, op.cit., at p. 89. That Article defines the legal persons that for the purposes of freedom of establishment are to be treated in the same way as natural persons who are nationals of Member States. If the use of Article 58 seems entirely justified in what relates to legal persons, as far as natural persons are concerned, it appears more reasonable to take recourse also to other legal sources. These sources could be, for example, the Member States rules of Private International Law and Article 1(h) of Regulation 1408/71 on Social Security, that defines as relevant residence the "habitual residence". According to the Regulation, the latter concept is different from a mere "temporary residence", or "stay". Note also that the Mikkelsen case does not seem to apply here. In that case the Court of Justice considered that the meaning of the term "employee" to be protected by Directive No.77/187 (quoted supra, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses) was equivalent to that of the persons protected as employees under national employment law. The Court referred to national law to define the precise meaning of a Community rule, justifying this with the fact that the Directive did not intend to establish a uniform level of protection throughout the Community on the basis of common criteria. The point is precisely that such does not seem to be the case here, as regards the definition of residents for the purposes of a fundamental freedom of movement, like the freedom of movement of capital. See case 105/84, Foreningen af Arbejdsledere i Danmark v. A/S Danmols Inventaar, in liquidation (Mikkelsen) [1985] ECR 2639, paragraphs 26-8.

[195] To be precise, the original version of Article 106 was replaced in the Treaty on European Union by the "new" Article 73H, which had almost exactly the same content as the former provision. The latter provision entered into force with the Treaty, but was repealed by the entry into force on 1st January 1994 of the new Articles 73B to 73G of the EC Treaty.

The general principle of this provision is subject to some restrictions based mainly on fiscal reasons or on grounds relating to monetary movements with third countries. However the provision is drafted in quite absolute terms[196] and is even broader than the old Articles 67 and 106. Now, to benefit from the free movement of capital or from the freedom of payments, it is not even required that a person be resident in a Member State. Moreover, insofar as capital movements are fully liberalised, it is not necessary to discuss whether they are justified by rights relating to freedom of movement of persons, services or goods.

Therefore an interesting situation arises. A third country national may be allowed by the national laws of the Member States to travel between them and to work and receive or provide services. This is not within the scope of Community Law. The third country national simply has no Community right to move within the Union, or to request services from another Member State. Yet, in these cases he or she does have a Community right to make any bank transfer related with those activities. This is so because he or she has a Community right to transfer money to another Member State, both to transfer capital and to make payments.

4 - Rights in the Framework of the Free Movement of Goods

Community Law regarding the free movement of goods applies to all products originating in the various Member States, as well as to goods originating in a third country which have been put into circulation within the Community. Therefore Community Law rules on the matter may be fully relied upon by third country nationals.

The relevant provisions of the EC Treaty, that is Articles 12 to 37,[197] make no direct or indirect[198] reference to the nationality of the traders involved.[199] Neither do they

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196 See Usher,J.A. in *Plender and Usher's Cases and Materials on the Law of the European Communities*, London, Butterworths, 1993, p.490. Note that certain restrictions on the absolute freedom of movement are allowed, mainly based on fiscal reasons or in relation to monetary movements with third countries.

197 Correspondent to the Title I (on "Free Movement of Goods") of Part Two (on "Foundations of the Community") of the EC Treaty.

198 I mean here a reference of the type made in Article 48 ("workers of the Member States"), which, according to the dominant view, refers to nationals of Member States only.

199 A single exception exists in Article 37. When referring to limits on the activities of State monopolies of the EC countries, this Article obliges Member States to "progressively adjust any State monopolies of a commercial character" so that by the end of the transitional period "no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States." While this rule could be seen as a proof that the free movement of goods would only apply to nationals of a Member State, in fact it does not seem to invalidate the assessment made in the main text. It should rather be understood as a defective application (resulting from the main and normal concern on traders of the EC, but not necessarily excluding others) of a more general principle stated generally in Article 9 and repeated, e.g., in Articles 10(1), 12, 13, 16, 30, 31, 32, 34 and 36(in fine) of the Treaty. Besides this attempt at a contextual analysis, the interpretation submitted is in practice indispensable for the full achievement of the purpose of the Treaty rules: the building up of a true common market on goods. Note finally the ruling of the Court referred to supra, in the main text, in relation to pecuniary charges on imports and exports.

refer to their place of residence. Consequently, it may be concluded that the governments of the Member States may not discriminate between traders on the grounds of nationality or residence. This idea was partly confirmed by the Court of Justice, when stating that:

> "The Treaty prohibits any pecuniary charge on imports and exports between Member States, irrespective of the nationality of the traders who might be placed at a disadvantage by such measures."[200]

What seems to be important for Community Law is the promotion of free trade within the EC, regardless of exactly who is going to be the primary beneficiary from it.

5 - The Right to Travel

a) The Proposed Right to Travel in the Framework of the Abolition of Internal Border Controls

As mentioned in the previous chapters, on 12 July 1995 the Commission presented three draft directives aimed at abolishing internal border controls on persons.[201] These Directives have not yet been adopted by the Council.[202] They deal with some inward aspects of the abolition of internal border controls on persons in the Union. The draft External Frontiers Convention is instead the main instrument dealing with matters that concern such abolition but that are related to the control of the external borders of the Union. This Convention is analysed in chapter 8.

One of the three draft Directives is a framework Directive[203] providing for the general elimination of controls on persons crossing internal frontiers. It establishes that all

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[200] Cases 2 & 3/69, Sociaal Fonds voor de Diamantarbeiders v. Brachfeld and Cougal [1969] ECR 211, at 223.

[201] These are the Draft Council Directive on the elimination of controls on persons crossing internal frontiers, COM (95) 347, final; the Draft Council Directive on the right of third-country nationals to travel in the Community, COM (95) 346, final; and the Draft European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, COM (95) 348 final, all three draft Directives are dated from 12/7/1995. The first two draft Directives are based on Article 100 of the EC Treaty. The third draft Directive mentioned (the one proposed in COM (95) 348) is based in Articles 49, 54(2) and 63(2) of the EC Treaty. These are the Treaty provisions that based the adoption of the Directives which are to be amended by this draft Directive.

[202] This draft Directive is meant to be implemented by the end of 1996. At the moment of writing this seems a somewhat ambitious objective. As mentioned in the previous chapter, the introduction of the Commission communication to the three draft Directives asserts that they are meant to be adopted after the approval of compensatory measures that guarantee security in the Union. However, there is no conditional clause in the main text of the Directives to that effect. In any case, and taking into consideration that unanimity in the Council is required for the adoption of these draft Directives, it is likely that their adoption will only be possible after the adoption of compensatory measures for such abolition. The problem is that the negotiations on the draft Convention on controls on persons crossing the external frontiers of the Member States [hereinafter External Frontiers Convention], and on the Convention on the European Information System are quite delayed - notably as far as the jurisdiction of the Court of Justice on them is concerned.

[203] Proposed in COM (95) 347 final.

persons, "whatever their nationality" can cross Member State frontiers within the Community "at any point" and "without such crossing being subject to any frontier control or formality."[204] Another draft Directive amends some rules of secondary Community Law, which allowed for the possibility that Member States control persons at internal borders - namely nationals of third countries.[205]

A key element for the abolition of internal border controls on persons is provided by another draft Directive. It would grant to third country nationals "who are lawfully in a Member State" the right to travel in the territories of other Member States.[206] This draft Directive does not affect Community Law already applicable to third country nationals, namely the Community rules on relatives of migrant nationals of Member States and the EEA Agreement. Thus, they may eventually benefit from the draft Directive provisions, but these cannot affect rights already enjoyed by those persons under Community Law.

The right to "travel" of third country nationals is defined as

> "the right to cross internal Community borders and to remain in the territory of a Member State for a short stay, or to travel onward, without the person concerned being required to obtain a visa from the Member State or States in whose territory the right is exercised".[207]

Yet, Member States may require persons exercising the right to travel to report their presence in their territories.[208]

The right to travel does not affect rules on stays other than for a short time, nor rules on access to employment or on the taking-up of activities as a self-employed person.[209] In any case, the right to travel, as above defined, is granted both to third country nationals holding a residence permit issued by a Member State[210] and to those who do not hold such a permit, but who entered the Union for a short stay.

Residents in another Member State, provided they possess a valid travel document and a valid residence permit, can travel to the territories of the other Member States for a

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[204] Idem, Article 1(1). Article 3(4) establishes that, for the purposes of the Directive, frontier control means "any control applied, in connection with or on the occasion of the crossing of an internal frontier, by the public authorities of a Member State or by other persons, under the national legislation of a Member State". Frontier formality signifies "any formality imposed on a person in connection with the crossing of an internal frontier and to be fulfilled on the occasion of such crossing". The general elimination of border controls is not meant to affect "the exercise of the law-enforcement powers" of national authorities over their territory, nor legal "obligations to possess and carry documents" - Article 1(2). Temporary reinstatement of controls are allowed in case of "a serious threat to public policy or public security", provided these controls "shall not exceed what is strictly necessary to respond to the serious threat" - Article 2.

[205] Draft Directive proposed in COM (95) 348 final.

[206] Article 1(1) of the Draft Directive proposed in COM (95) 346, final. Cf. the rules of this draft Directive with those of the draft External Frontiers Convention on the same topic, notably its Article 8. This draft Convention is analysed in chapter 8 and has many points in common with the corresponding provisions of the draft Directive. For the relation between the two instruments see also the Commission's introduction to the draft Directive, particularly in the comments specifically related with the Directive provisions, at points 28 to 45.

[207] Article 2(1) of the Draft Directive proposed in COM (95) 346, final.

[208] Article 5.

[209] Idem, Article 1(3).

[210] Ibidem, Article 3 and Article 2(2).

continuous period of up to three months.[211] The draft Directive provides that Member States shall readmit third country nationals to whom they issued residence permits and who are found unlawfully residing in another Member State. The conditions for the existence of the duty of readmission are spelled out in an Annex to the Convention. This Annex provides, for example, that the Member State of residence has the duty to readmit a third country national holding a residence permit issued there, "within a period of up to two months after the expiration of the validity of the residence permit". However, the authorities of the Member State where the person is found during an illegal stay have to lodge the request of readmission within one month after "becoming aware of the person's unlawful presence in the Member State".[212]

Third country nationals who do not hold a residence permit in a Member State, and who entered the Union for a short stay, will enjoy the right to travel in other Member States in two types of situations.[213] First, if they hold a visa which is valid throughout the Community and which is "mutually recognised for the purpose of crossing the external frontiers of the Member States."[214] Secondly, in the case that they are not required to hold a visa to enter into certain other Member States where they are going to travel. In the first case, i.e. if they hold a Community valid visa, they may travel in the territory of the Member States during the period of stay permitted by the visa, and provided "they are in possession of a travel document bearing the valid visa". In the second case, if third country nationals do not have a Community valid visa, they may be either exempted from visa requirements by all Member States, or subject to them in some Member States only. If no Member State requires them to have a visa, then, provided they possess valid travel documents, they may travel in the territory of the Member States for up to three months within six months after the date of the first entry in one Member State. If only some Member States require them to have a visa (and they do not have a Community valid visa), they also have to possess valid travel documents to enjoy the right of travel. However, they can travel only to Member States that do not require them to have a visa. Finally, explicit provision is made for the possibility that a Member State authorises visa holders to stay in its own territory for more than three months.

In the meantime it should be noted that any third country national covered by the draft Directive can be expelled from a Member State for several reasons.[215] First, provided he or she

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211 See, generally, Article 3.

212 Note that, in contrast, the draft Convention on the External Borders does not contain detailed provisions on the readmission by a Member State of third country nationals who are unlawfully resident in another Member State, but who hold a residence permit issued by the former Member State. Article 8(3) of the draft Convention only makes a general provision for the duty of readmission of Member States, adding that it will be subject to "conditions determined by measures to give effect to [the] Convention".

213 See, generally, Article 4.

214 Article 4 and Article 2(3).

215 This applies both to third country nationals who hold a residence permit of another Member State and to third country nationals who do not hold such a residence permit. In the latter case, the first sentence of Article 4(5) refers that expulsion is possible when they were "allowed to enter the Community for a short stay." See also Article 4(4), providing that Article 4 does not preclude Member States to authorise third country nationals to stay in their territory for more than three months. The situation of third country nationals who are authorized to stay for more than three months, but not as residents (e.g. asylum seekers), does not seem to be addressed by the draft Directive in an explicit manner. See, however, Article

"represents a threat to public order or public security in the Member State in which he is exercising the right to travel, or to its international relations."[216]

Secondly, if he or she does not "have sufficient means of subsistence". These must enable them to financially cover the period of the intended stay or transit. Moreover, they must enable them to return to the Member State where they are resident, or to go to another country where they are certain to be admitted.[217] Finally, a third country national can also be expelled if he or she does not possess the required documents, or if he or she stays in the territories of Member States for a longer period than he or she was allowed.

As a general assessment of this draft Directive it could be said that it would have a positive effect for third country nationals, since it would facilitate their movements and those of their families within the Union. However, it is easy to see that the regime it provides is rather partial and incomplete.[218] First, the rules of the draft Directive use a number of concepts which are not defined in the least manner, such as "sufficient means of subsistence", or "threat to public order or public security in the Member State in which [a third country national] is exercising the right to travel, or to its international relations". How the possibility of expulsion relates to the respect of the fundamental human rights of the person concerned - such as the right to freedom of expression and the right of asylum is not clear. Secondly, several aspects of the right to travel of third country nationals, as proposed by the draft Directive, are clearly connected with aspects of the draft External Frontiers Convention - such as matters related to visas. That Convention is has yet to be concluded, not to mention fully implemented. Only then would a general and coherent legal framework be set up, as far as the right to travel is concerned. Finally, it should be recalled that third country nationals, themselves, do not have a Community right to receive or provide services in another Member State. It does not seem coherent that third country nationals only have a Community right to travel in other Member States, without having at least a Community right to be tourists there and thus to be recipients of services. Some

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3(4) and the Commission remarks' in the introduction to the draft Directive, point 39. In the meantime, one may note that in this respect the rules of the External Frontiers Convention seem more elaborated, since they envisage the existence of third country nationals with "provisional residence permits". See Article 8(2) of that Convention and chapter 8 for more details.

216 Article 3(3) and Article 4(3). Cf. with Article 7(1)(c) of the draft Convention on External Frontiers, discussed in chapter 8.

217 The possession of sufficient means of subsistence is both a condition for the exercise of the right to travel and a justification of expulsion. See, Article 3 (respectively paragraph 1 and 3) and Article 4 (respectively paragraphs 1 and 2, and paragraph 3). By contrast, the threat to the public order, to the public security, or to the international relations of the Member State where the person is exercising the right to travel is only a ground for expulsion from that State. The difference in practice is presumed not to exist, since controls at the borders are to be eliminated, according to the draft Directive proposed in COM (95) 347. However, the difference may have some relevance if the draft Directive on the third country nationals' right to travel is approved before the framework Directive on general abolition of internal border controls. The possibility of this prior adoption of the former Directive is suggested by the Commission in point 3 of the introduction of the draft Directives.

218 This could eventually be explained by the fact that, as referred to in chapter 3, the presentation of these Directives is most probably also related to the action of the European Parliament against the Commission for its failure to act to abolish internal border controls on persons by the end of 1992. See chapter 3, section B.

Community regulation of their position as tourists, and recipients of services in general terms, only seems logical. This has yet to be achieved.

b) The Right to Travel to European Works Council meetings

At least in one situation it seems arguable that third country nationals (in their capacity as workers in a Member State) may enjoy a Community right to travel to another Member State under an already existing instrument of Community Law. This right to travel can be construed on the basis of the European Works Council Directive.[219] If a third country national worker is a representative on a European Works Council, when the latter meets in another Member State, that worker[220] should be considered to have a Community right to go there to attend the meeting.[221]

Naturally, it would only be necessary to invoke this right inasmuch as the previously mentioned draft Directive on the right of third country nationals to travel between Member States for a short period is not in force. As explained above, it is not certain whether this draft Directive will be adopted soon. Furthermore, even if it were to be adopted as the Commission proposed, it would have to be implemented by the end of 1996, while the European Works Council Directive has to be implemented by 22 September 1996, at the latest. The Commission draft Directive on the right of third country nationals to travel between Member States may not be in force by then. In that case, one may wonder what would be the legal regime to apply concretely to the right that third country national workers have to travel to another Member State - for a meeting of a European Works Council in which they are representatives. Arguably, this legal regime could be inspired by the relevant rules applicable to the movement of nationals of Member States to another Member State to receive services. Alternatively, or as a complement, it could be inspired by the regime applicable to cases of third country national workers employed in an EC enterprise providing services in another Member State.[222] Another possibility would be that such regime be inspired by the very rules of the Commission draft Directive on the right of third country nationals to travel to another Member State.

Finally, note also that, the Justice Council has adopted under Title VI of the Treaty on European Union, a joint action to facilitate the travel within the Union for third country nationals' school children.[223]

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[219] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254/64, of 30/09/94. This Directive was based on "the Agreement on social policy annexed to the Protocol 14 on social policy annexed to the Treaty establishing the European Community, and in particular Article 2(2) thereof", as mentioned in its Preamble.

[220] The same may be sustained for a representative of an employer.

[221] This could, for example, be considered included in the (usual) clause contained in Article 14 of the European Works Council Directive, according to which Member States shall take all necessary steps enabling them at all times to guarantee the results imposed by the Directive.

[222] The regime of free movement of persons in this cases is examined below in this section.

[223] Decision 94/795/JHA on a joint action concerning travel facilities for school pupils from third countries resident in a Member State, adopted by the Council on 30 November 1994, OJ L 327/1-3.

6 - Other situations

Unless they are close relatives of nationals of a Member State, third country nationals are excluded from the scope of the Directives on the right of residence for students,[224] for retired persons[225] and for persons who do not have that right under other instruments of EC Law.[226] The right of residence provided by these Directives is limited to "nationals of Member States" and some of their relatives.[227]

The same situation holds for the provisions establishing European citizenship in the Treaty on European Union. The new Article 8 of the EC Treaty establishes that "every person holding the nationality of a Member State shall be a citizen of the Union". No possibility is envisaged for the direct acquisition of European citizenship by third country nationals, that is without acquisition of the nationality of a Member State. This issue will be deal with in Chapter 7, in which the new rules introduced by the Treaty on European Union are analysed.

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[224] Students in a vocational training course, see Council Directive 93/96/EEC of 29/10/1993 on the right of residence for students, OJ L 317/59 of 18/12/1993. This Directive was adopted by the Council following the annulment of Directive No. 90/366/EEC on the right of residence for students, OJ L 180/30 of 13/7/90. This latter Directive was annulled because the Court ruled that its legal basis should have been Article 7(2) and not Article 235 of the EC Treaty. According to the Court, acts adopted under Article 7(2) of the EC Treaty should not be necessarily confined to the regulation of rights deriving from the first paragraph of Article 7. Such measures may also deal with aspects which regulation seems necessary to the effective exercise of such rights. In this context the Court considered that the right of residence of students' relatives is an indispensable element for the effective exercise of the right of residence of students. Therefore the Court annulled Directive 90/366, while maintaining its effects until the entry into force of the new Directive adopted on the appropriate legal basis. See case C-295/90, European Parliament v. Council [1992] ECR I-4193. The justification for the ruling of the Court is quite interesting, since it confirms that the right of residence for relatives of a migrant national of a Member State is an "indispensable" condition for the exercise by that migrant national of his or her freedom of movement. To certain extent, this part of the Court's ruling draws an interesting light on the analysis made infra on the right of residence in another Member State of third country nationals who are relatives of a migrant national of one Member State, when the latter moves to that other Member State. The right to move with one's family is indispensable for the freedom of movement of the migrant national of a Member State, himself or herself.

[225] Council Directive No. 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180/28, of 13/7/90.

[226] Council Directive No. 90/364/EEC on the right of residence for persons who do not enjoy this right under other provisions of Community Law, OJ L 180/26, of 13/7/90. These three Directives will be referred to as the "three Directives of 1990 on the right of residence", although, as mentioned supra, Directive 90/366/EEC on the right of residence for students, was annulled and replaced by Council Directive 93/96/EEC.

[227] Article 1 of all the three Directives.

B) RIGHTS GRANTED TO THIRD COUNTRY NATIONALS DUE TO THEIR FAMILY RELATIONSHIP WITH A NATIONAL OF A MEMBER STATE

1 - RELATIVES OF A MIGRANT NATIONAL OF A MEMBER STATE

a) General aspects

(i) subordinate rights and reverse discrimination

Third country national relatives of a Member State national who exercises his or her right to free movement within the Union, are granted under Community Law the right to move from one Member State to another with that Member State national. The aim of this right is to put the national of a Member State with third country national relatives in the same position as that of a national of a Member State whose family is entirely made up of Member State nationals. Therefore, Community Law relating to the freedom of movement of persons entitles relatives of nationals of a Member State to a certain number of rights, making explicit provision that these rights be recognised irrespective of the nationality of such relatives.

The rights of third country national relatives are subordinate rights. They are only granted so as to allow those persons to accompany a migrant national of a Member State. They can only be enjoyed if the national of a Member State actually exercises his or her right to free movement.[228] This raises the issue of reverse discrimination, as exemplified by the Morson & Jhanjan cases.[229] In these cases two Surinamese mothers of two Dutch nationals claimed the right to reside with their sons in the Netherlands, under Article 10 of Regulation 1612/68.[230] The problem was that their sons, who were working and residing in that country, were never employed, nor worked in another Member State. For this reason, they could not benefit from the Community rules regarding the free movement of workers and, thus, their Surinamese mothers could not reside with them in the Netherlands.

This is a typical case of reverse discrimination, i.e., the possibility that Member States treat less favourably their own nationals under national law, than they do have to treat nationals of other Member States who are protected under Community Law.[231] This

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[228] This is, after all, the same requirement that applies to the nationals of a Member State, themselves: they may only enjoy the rights related to free movement if they actually move within the Community.

[229] See Cases 35 & 36/82, Morson and Jhanjan V. Netherlands [1982] ECR 3723.

[230] See below, in this section, for an analysis of this provision.

[231] On reverse discrimination and Community Law, see Druesne, G., "Remarques sur le champ d'application personnel du droit communautaire: des discriminations à rebours peuvent-elles tenir en échec la liberté de circulation des personnes?", *RTDE*, Vol.15, 1979, No.3, pp.429-439; Greenwood, C., "Nationality and the Limits of the Free Movement of Persons in Community Law", *YEL*, Vol.7, 1987, pp.185-210, particularly at pp.192-205; Jessurun D'Oliveira, H.U., "Is Reverse Discrimination Still Permissible Under the Single European Act?", in *Forty Years On: The Evolution of Postwar Private International Law in Europe*, Deventer, Centrum voor Buitenlands Recht en Internationaal Privaatrecht/Kluwer, 1990, pp.71-86; Johnson & O'Keeffe, op.cit., pp.1313-1346; Kon, S.D., "Aspects of

discriminatory treatment is allowed for under Community Law, although Article 6 of the EC Treaty forbids discrimination on the grounds of nationality, simply because this prohibition applies only to cases which are considered to be "within the scope of application of this Treaty", as required by that Article. This problematic can be analysed from two perspectives. On one hand it is possible to examine the manner in which the scope of application of Community Law is defined. On the other hand, in a more fundamental manner, reverse discrimination can be questioned in itself.

Reverse discrimination has been cleared by the Court of Justice, as far as Community Law is concerned, when the situations at stake are "purely internal cases", i.e. cases "where there is no factor connecting them to any of the situations of Community Law".[232] The Court of Justice has held, for example, that cases such as Morson & Jhanjan, referred to above, were purely internal cases. In those cases the nationals of a Member State, i.e. the children of the plaintiffs, never exercised the right to freedom of movement, they did never went to another Member State to work. Thus they could not ask for the advantages of the provisions adopted for the persons who do exercise such rights, like the provisions establishing the right of relatives to follow nationals of a Member State to another Member State.[233]

However, in certain cases, Community Law on free movement may be invoked by a national of one Member State against the authorities of that very State. In the Knoors case,[234] a Dutch national residing in Belgium, where he worked as a plumber, sought permission to work in the Netherlands. The Dutch authorities refused this request because he did not have the required Dutch qualifications, only the Belgian ones. Had he been Belgian, under Community Law the Dutch authorities would have had to accept his qualifications for him to work in the Netherlands. The Court of Justice denied that this was a purely internal case. The Court considered that the situation of Mr.Knoors, who had resided in another Member State and had obtained qualifications there, could "be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty".[235] This was held to be so despite the fact that Article 52 grants the right to

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Reverse Discrimination in Community Law", *ELR*, Vol.6, 1981, No.1, pp.75-101, particularly at pp.75-91 and 100-101; Pickup, David M.W. "Reverse Discrimination and Freedom of Movement for Workers", *CMLRev*, Vol. 23, 1986, No.1, pp. 135-156.

[232] Case 175/78, Regina v. Vera Ann Saunders [1979] ECR 1129, paragraph 11. This case was related to freedom of movement of workers. The same ruling was applied to a case related to freedom of provision of services, in case 52/79, Procureur du Roi v. Debauve [1980] ECR 833. Here the Court of Justice ruled that "the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are only confined within a single Member State". See idem, paragraph 9.

[233] See Morson & Jhanjan cases, quoted supra, paragraph 18. See also, in the field of derived rights under Regulation 1408/71 (quoted supra) case 147/87 Zaoui v. Caisse régionale d'Assurance maladie de l'Ile de France [1987] ECR 5511, paragraphs 14-16; and case C-206/91, Ettien Koua Poirrez [1992] ECR 6685. See also case C-297/88 and C-197/89, Massam Dzodzi v. Belgian State, [1990] ECR I- 3763, paragraphs 23-4.

[234] Case 115/78, Knoors v. Secretary of State for Economic Affairs [1979] ECR 399.

[235] Idem, paragraph 24. The Court stated also that exception to this finding could arise, considering "the legitimate interest which a Member State may have in preventing certain of its nationals, by means of the facilities created by the Treaty, from attempting wrongly to evade the application of their national legislation(...)." See paragraph 25. This was not the case of Knoors, considering that the length of periods during which the activity in question must have been pursued excluded abuse. See paragraph 26.

freedom of establishment to "nationals of a Member State" who wish to establish themselves "in another Member State".

This teleological and not literal interpretation of Community rules may perhaps be considered an example of the more positive side of the Court of Justice's doctrine concerning the scope of Community Law, as far as reverse discrimination is concerned.[236] However, in other cases it does not seem to be so clear that the solution and the justification used by the Court are justified.[237] More broadly, legal literature has questioned the Court's criteria to decide whether or not a case, in which a national of a Member State invokes EC rules against its own State, is within the scope of Community Law.[238] It has been argued that the definition of what is a purely "internal case" should not be limited to taking into consideration "some sort of catalogue of contacts or factual points of reference" of a case. Instead, examination should also be made of the "Community norms and principles that, given their purposes and policies, claim application to certain category of cases". It "is important to determine the object and scope of Community rules" and consider "the very teleology and dynamics of the Community legal system".[239]

From a more fundamental perspective, reverse discrimination can be questioned in itself, as far as its justification is concerned. It has correctly been argued that reverse discrimination is less and less sustainable in an internal market "without internal frontiers", as required by Article 7A.[240] As Jessurun D'Oliveira recalls:

> "it now becomes extremely difficult to uphold the distinction, drawn until now, between 'purely internal' cases and 'Community cases'. Aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is self-contradictory."[241]

In fact, the very logic of the internal market may justify the prohibition of discrimination against persons who stay in their Member States of origin, and whose situation may thus be considered not to have any "contact" with another Member State. The objective of an harmonious and balanced development of economic activities and the

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However, that consideration may justify the requirement that freedom of movement under Community Law be exercised a period long enough so that (in the specific circumstances of the situation at stake) it may be considered a true exercise of such freedom, and not a mere fraud to national law, through the use of Community Law.

236 See also the below examined case C-370/90, Surinder Singh, [1992] ECR I-4265.

237 See case 175/78, Ann Saunders, and cases 35-6/82, Morson & Jhanjan, quoted supra and criticised by Jessurun D'Oliveira, op.cit., pp.78-9, and 80 respectively. The former case is also criticised by Kon, op.cit., at pp.90-1. Particularly open to criticism is case 180/83, Moser v. Land Baden-Wurttemburg [1984] ECR 2539. This case is critically analysed by Pickup, op.cit., pp.135-7 and 154.

238 See, e.g., Greenwood, op.cit., p.205, who sustains that the criteria is vague and difficult to apply, although he states that "in view of the complexity of the subject", and considering the lack of need to do so in the specific cases before the Court, "it is perhaps unreasonable to blame the Court for not going out of its way" to elaborate on the criteria.

239 Jessurun D'Oliveira, op.cit., pp.74-5.

240 See Jessurun D'Oliveira, op.cit., pp.82-6. The same type of argument is also mentioned by Weatherill & Beaumont, *EC Law - The Essential Guide to the Legal Workings of the European Community*, London, Penguin, 1993, p.540.

241 See Jessurun D'Oliveira, op.cit., p.84.

raising of the quality of life,[242] for example, may be inconsistent with the practical incentive for a person to go to another Member State, just to benefit from Community provisions. As in the Morson & Jhanjan cases, these provisions could, for instance, give a person the right to bring his or her relatives from a third country (or indeed from another Member State) to the Member State of residence (different from the country of origin of the migrant national of a Member State).[243] If this person goes to another Member State just for the purpose of benefiting from Community rights (e.g. on family reunification) the objective of optimal economic performance in the Union may be jeopardised. For if that person stays in his or her Member State of origin, he may be able to contribute more to Community objectives, than if he or she is obliged to go to another Member State just to exercise a fundamental human right like family life.

Furthermore, reverse discrimination may also raise the issue of violation of the principle of equality enshrined in several Member States' constitutions[244] and in Article 10 of the European Convention of Human Rights. A differential treatment based on whether a person has or has not exercised the Community right to freedom of movement of persons is likely to be entirely illegitimate. To the extent that such differential treatment may be justified by a legitimate interest, for example to compensate migrants for the eventual disadvantages arising from their migration between Member States, it may happen to be disproportionate to the aim pursued. It may be discriminatory.

(ii) overview of the relatives' rights

To start with, it may be recalled that, according to Article 1 of Regulation 1612/68, the right to take up employment in another Member State applies to "[a]ny national of a Member State irrespective of his [or her] place of residence". Therefore, it seems clear that this right (including the right to move with family members to the other Member State) also applies to nationals of a Member State who do not reside, or indeed did never reside in any Member State. These nationals include, naturally, persons who obtained the nationality of one Member State while living in a third country, namely their own third country of origin. This also results from the difference between the wording of Article 48 and Article 59, the latter requiring that to enjoy freedom of establishment, the national of a Member State must be established in one Member State.

In any case, the legal status of third country national relatives of a national of a Member State is not the same in all situations protected by Community Law. The type of relatives protected under that Law, their rights and the extension of these rights, depends very much on the title under which the national of a Member State moves within the

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242 As mentioned in Article 2 of the EC Treaty, as amended by the Treaty on European Union.

243 See, e.g., Gutmann, who points out that "Germans seeking family reunion may find it advisable to move around the European Union before seeking [their relatives] admission to Germany", op.cit., p.98. See Gutmann, R., "Discrimination against own nationals: a brief look at European Union and German immigration law", *INLP*, Vol.9, 1995, No.3, pp.97-99.

244 See case C-132/93 Volker Steen v. Deutsche Bundespost [1994] ECR I-2715, paragraph 11, in which the Court of Justice ruled that "Community Law does not preclude a national court from examining the compatibility with its constitution of a national rule which, in a situation unconnected with any of the situations contemplated by Community Law, treats national workers less favourably than nationals from other Member States."

Union. Here only an overview of these rights and of the beneficiaries of these rights will be made. A more in depth examination will be made later regarding the legal issues relating to the rights of residence, work, education, social and tax advantages, and social security.

The idea behind the rights granted to the relatives of a national of a Member State is to facilitate the movement of the latter within the Community. Therefore, his or her close family has the right to move with him or her to another Member State and to live there in similar conditions to those of the nationals of that State.

The relatives who may move with the national of a Member State within the Community differ according to the reason why he or she enjoys freedom of movement: whether the migrant national of a Member State has the right to move to another Member State under the EC rules on free movement of workers, of self-employed persons, of students, of pensioners or of persons "who do not enjoy this right under other provisions of Community Law."

The precise extent of the rights of the relatives of a migrant national of a Member State also depends on the reason for which he or she is a beneficiary of free movement. Generally speaking, however, it may be said that his or her relatives are entitled to leave the Member State of origin where they previously resided[245] and enter another Member State[246] and reside there.[247] When third country national relatives enter a new Member State, they may be required to have an entry visa or equivalent document by that State. However, Member States "shall accord to such persons"[248] "every facility for obtaining any necessary visas".[249] This has not always been applied in practice, and on a number of

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245 Specifically mentioning this aspect there is Article 2 of Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers and members of their families, OJ L 257/13 of 19/10/68, later amended - OJ L 2/1 of 1/1/73. That Article applies "*mutatis mutandis*" to the relatives of the beneficiaries of the three sister Directives of 1990 on the right of residence, due to Articles 2(2) of the latter. Referring to the right to leave the former Member State of residence there is also Article 1 of Council Directive 73/148, of 21/5/1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, OJ L 172/14 of 28/6/1973.

246 Article 3 of Directive 68/360, applicable to relatives of workers and to relatives of the beneficiaries of the three Directives of 1990 on the right of residence, according to their Articles 2(2). See also Article 2 of Directive 73/148 (quoted supra) for the relatives of self-employed persons.

247 See infra for details.

248 Or "shall endeavour to afford to such persons" in the words of Article 2(2) of Directive 73/148 (for self-employed persons).

249 Article 3(2) of Directive 68/360, applicable to workers and students, pensioners and "others", according to Articles 2(2) of the three Directives of 1990 on the right of residence. See also Article 2(2) of Directive 73/148 for self-employed persons, quoted supra. Note that, as mentioned supra in section A, in one of the three Directives proposed by the Commission to abolish internal border controls on persons, the Commission proposed the deletion of some rules of EC secondary legislation allowing Member States to request visas (or other formalities) for the entry of third country nationals in their territories. See Article 1 of the draft Directive presented in COM (95) 348 final, of 12/7/1995, final. Note, however, that the adoption of this draft Directive seems to entail a somewhat contradictory or not entirely clear regime. The proposed new version of Article 3(1) of Directives 68/360 and 73/148 would allow to the beneficiaries of the freedom of movement (including their relatives) the entry to the territory of Member States. They could even cross the Member State's external borders by simply presenting a valid identity card or passport. The problem is that the present Article 3(2) of both Directives would remain unchanged. It provides that Member States may require visas for the entry in their territory of relatives of primary beneficiaries of the freedom of movement, provided those relatives are not nationals of a Member State.

occasions, the European Commission has initiated the action in Court provided by Article 169 of the EC Treaty against certain Member States that were charging money for the issue of such visas.[250]

While living in a host Member State, the relatives of a migrant national of a Member State may work there, and the children of that migrant (and the children of the migrant's spouse) are entitled to attend school.[251] Moreover, in order to guarantee the complete integration of a migrant national of a Member State into a host Member State, he or she is given certain rights that are directly relevant to the situation of his or her family. If the national of a Member State is a worker, he or she is given, for example, the right to enjoy all rights and benefits accorded to nationals of the Member State in matters of housing.[252] Furthermore, he or she has the right to benefit from the same "social and tax advantages" as national workers.[253] Finally, in certain circumstances, when a national of a Member State is employed or self-employed, his or her relatives may even stay in the host Member State after his or her activities have ceased.[254]

b) Right of Residence

As far as migrant workers are concerned (when they are nationals of a Member State) the right enjoyed by his or her relatives to reside in the host Member State is regulated by Article 10 of Regulation 1612/68.[255] It provides that:

> "(1) The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

Thus, while the new Article 3(1) would grant them the right to enter Member States, and the right to cross their external frontiers by simply showing a valid identity card, Article 3(2) would continue to allow Member States to ask them for a visa. Moreover, this does not seems to be consistent with the objective of the draft Directive on the right to travel of third country nationals, presented in COM (95) 346. This draft Directive would grant the right to travel without the need of obtaining a visa, to all third country nationals residing in the Union, as well as to those who enter it for a short stay - under the conditions explained supra, in section A.

250 See Commission of the European Communities, 7th Annual Report on the Control of the Implementation of Community Law - 1989, COM (90) 288 final, 1989, published in OJ C 232/1 of 17/9/90, at p.19. Proceedings of the Commission against Member States for their failure to respect Community rules on free movement of persons are not rare. Note, for example, that the Commission has decided to commence infringement proceedings under Article 169 against nine Member States for incorrect transposition of one or more of the three sister Directives of 1990 on the right of residence in another Member State. See Twelfth Annual Report on Monitoring the Application of Community Law (1994), COM (95) 500 final, of 7/6/1995, point 2.4.2, OJ C 254/1 at 29, of 29/9/1995.

251 See infra for details.

252 Article 9 of Regulation 1612/68.

253 Article 7(2) of Regulation 1612/68.

254 Article 3 of Regulation (EEC) No 1251/70 of the Commission on the right of the workers to remain in the territory of a Member State after having been employed in that State, OJ L 142/24 of 30/6/1970, and Article 3 of Council Directive 75/34/EEC concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, OJ L 14/10 of 20/1/75.

255 Quoted supra.

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse.

(2) Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country hence he comes."[256]

As we can see, the migrant worker's relatives that have a Community right of residence in the host Member State are the spouse and their descendants under the age of 21 years, and also, provided they are dependent, their ascendants, as well as descendants over the age of 21.[257] According to the Court's ruling in the Lebon case, the dependency of relatives on a national of a Member State is a matter of fact and the reasons for its existence are irrelevant.[258]

The group of relatives of migrant workers with the right of residence may be compared with the relatives of self-employed migrants having such right. The spouse and children under the age of 21 of a self-employed person have also the right of residence in the host Member State. However, all of his or her descendants (apart from his or her children under the age of 21), and all those of his or her spouse are not entitled to follow the family if they are not dependent.[259] Therefore, the difference between the worker's relatives and those of a self-employed migrant, is that in the case of the latter, no child of the spouse has a right to reside without being dependent. Instead, the children of the spouse of the migrant worker who are under the age of 21 do have the right of residence even if they are not dependent.

It is submitted, however, that a proper interpretation of the Treaty provisions on the free movement of persons entails that the children of the migrant national of a Member State, and the children of that migrant's spouse, have the same Community rights in the host Member State. This principle should apply to the right of residence and to any other Community right in the host Member State.[260]

On the other hand, a feature common to the regime of workers and that of self-employed migrants is that the ascendants of the migrant, and of the migrant's spouse, may move with them to another Member State, provided the ascendants were dependent on them in the first Member State.[261]

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256 Paragraph (3) of the same Article provides that for "the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered normal for national workers in the region where he is employed; this provision, however, must not give rise to discrimination between national workers and workers from other Member States." The Court has interpreted this rule in a manner that protects rights of the migrant workers and their relatives. See the reference made to case 249/86, Commission v. Germany, in section B of chapter 8.

257 Note also that the relatives of a migrant worker who is national of a Member State benefit almost in the same way as the latter from the rules on the basic conditions for free movement of persons, as laid down by Council Directives 68/360, and 64/221, both previously quoted. These state the conditions and formal requirements that can be applied to a worker or a member of his family who wishes to enter and stay in another Member State.

258 Case 316/85, Lebon , quoted supra, paragraph 22.

259 Article 1 (c) and (d) of Directive 73/148/EEC.

260 See also Steiner, op.cit., p.213.

261 Article 10 (1)(b) of Regulation 1612/68 and Article 1 (d) of Directive 73/148/EEC.

Meanwhile, it is established that Member States shall "facilitate the admission of other members of the family" of migrant workers and self-employed persons.[262] A restrictive interpretation of this rule would only require Member States to use their best endeavours and would confer no rights to individuals.[263] A less narrow interpretation is sustained by Wyatt & Dashwood[264] in relation to the worker's relatives. They believe that all dependent relatives should be given a right of residence. They base their position on the general references made by the provisions of Directive 68/360. Article 4(1) of the latter provides that Member States shall grant the right of residence to the persons referred in Article 1 of the same Directive. This, in turn, provides that Member States shall abolish restrictions on the movement and residence of migrant nationals of other Member States and their relatives as defined by Regulation 1612/68. This Regulation refers indeed to all relatives of the migrant national of a Member State, although making the distinction referred to before - i.e. granting the right of residence to some relatives[265] and providing that other relatives shall have their admission facilitated.[266]

I suggest that, at least, Article 10(2) of Regulation 1612/68 should be seen as a stand-still clause. The provision states that the Member States "shall facilitate" the admission of other relatives of migrant nationals of a Member State. Thus, it could be interpreted as meaning that Member States cannot make the admission of other relatives of those nationals of a Member State more difficult than the admission of relatives of their own nationals, as this stood at the time the relevant EC rules entered into force.

Nevertheless, to achieve the best interpretation of Community Law in this respect, a substantial criterion that is more elaborate and general should be sought. Under EC Law on the free movement of persons, the right of residence could perhaps be extended to any relative of a migrant national of a Member State if two conditions were met. The first is that his or her particular circumstances are such that a right of residence is important, or indeed indispensable, in deciding to move to another Member State. The second condition is that the granting of the right of residence to a particular relative or group of relatives should not conflict with the interests of the host Member State, these interests being understood as those of a democratic society.

Each of these two conditions should be viewed in the context of the other. To some extent this is already done in positive Community Law - in the instruments with specific rules on the rights of relatives of a migrant national of a Member State. However, in these instruments the relative importance of the two conditions - that is of the national of a Member State to move with his or her family, and the interests of the host Member State - is expressed through legal presumptions only. Consequently, from the point of view of formal, positive Law, the spouse of a national of a Member State has the right of residence in the other Member State, even if the couple has been separated for a

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262 According to article 10 (2) of Reg. 1612/68 and Article 1(2) of Directive 73/148.

263 Pointing in that direction see Hartley, op.cit., p.132.

264 Wyatt, D. & Dashwood, A. *European Community Law*, 3rd.ed., London, Sweet & Maxwell, 1993, at pp.245-6.

265 Article 10(1) of Regulation 1612/68.

266 In case they are dependent on the worker or live under his or her roof in the country whence he or she comes. Idem, Article 10(2).

considerable period.[267] This right of residence of the spouse applies even if it is not important, or indeed is irrelevant, in the decision of the national of a Member State to move. The right of residence of the spouse exists because it is simply presumed to be essential in order for the national of a Member State to move. An opposite case occurs when a national of a Member State genuinely wishes to move to another Member State, but is prevented from doing so because a third country national relative is disqualified from moving with him. For example a national of a Member State has a two year old brother who became an orphan due to an accident in which both his or her parents have died. The baby is a third country national and has no one else to take care of him.[268] His or her older brother may consider the possibility of giving up a new job in another Member State because his or her young brother could be refused a right of residence there. In this case, secondary Community Law presumes that the brother is not important for the situation, whereas in fact he or she is. Arguably, it would amount to a violation of the Treaty rules on free movement not to grant to such a baby the right to follow an older brother to the host Member State.

It is suggested that the best judicial interpretation of the EC Treaty could make exception to positive rules of Community Law and give proper attention to the aims of the free movement of persons. Another, although secondary point of reference could be the legal duties of the migrant national of a Member State, for example the duty to take care of a dependent brother, sister, or child of the deceased spouse.

Nevertheless, there are also situations where the right of residence would be denied to take into due account the interests of the host Member State. Clear examples are those covered by the clauses relating to public policy, public security or public health, which are included in the Treaty of Rome and in secondary legislation.[269]

Moreover, it appears obvious that the reasoning suggested would apply equally to relatives who are third country nationals and also to nationals of a Member State, if necessary.

There is a peculiarity concerning the right of residence of relatives of nationals of a Member State who are providers or recipients of services. It is due to the temporary character of the activity. This character explains the fact that the right of residence is

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[267] See, somewhat in that sense Case 267/83, Aissatou Diatta v. Land Berlin [1985] ECR 567. See also the analysis on this case to be made below.

[268] Let us imagine an extreme case, just to show that perhaps the wrong legal position is to take the positive rules too much by the letter. See also, in this respect, section B of chapter 8, as far as family reunification is concerned. There it is recalled, for example, that in recommendation No.1082/1988 of the Parliamentary Assembly of the Council of Europe, it was proposed that admission for family reunification of foreigners (including even resident third country nationals) be authorised to the following relatives: the married or unmarried spouse who has been living with the joined foreigner for more than a year; the underage children of the couple or of one of its members; the children of full age if they are dependent because of a disability or illness; and dependent ascendants (proposal 2).

[269] See Articles 48(3), 56 and 66 of the EC Treaty and also Council Directive 64/221/EEC, quoted supra.

limited to the period during which the services are provided,[270] and that there is no right to remain in the host Member State after that period.

As referred to above, in 1990 three new Directives extended the right of residence to virtually any national of a Member State. However, a very important limitation of this right is that all beneficiaries[271] may only acquire it if they prove to have "sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence" and to "be covered by sickness insurance in respect of all risks in the host Member State".[272] This applies both to the national of a Member State directly entitled to the right of residence, as well as to the members of the family.

This requirement is fundamentally different from the instruments regulating the right of nationals of a Member State who move to work in another Member State, because the right of residence of these persons is independent of any condition related to their precise economic situation - besides by virtue of working there.[273]

Another interesting aspect of these Directives is that students may only be accompanied by their spouse and their dependent children; but pensioners and "other" migrant nationals of a Member State may be followed by the spouse, and, if they are dependent, by their descendants and ascendants.[274] It is curious that students are those with the least rights, even less than those who have never worked. One might wonder about the justification for this limitation might be. An assumption that students are too young to have dependent ascendants does not appear to legitimate a complete prohibition on the right of residence of these relatives. The restriction can exclude situations perfectly worthy of protection, however statistically unimportant they may appear.

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[270] Article 3 (2) and (3) of Directive 73/148. The same could be considered to be applicable to the receipt of services, according to the Court of Justice's doctrine that freedom of services applies to providers and recipients. See cases 286/82 & 26/83 Luisi & Carbone [1984] ECR 377, at 401.

[271] The person directly entitled to the right of residence, as well as the members of the family.

[272] Articles 1 of all three Directives. See the critical remarks on this point by O'Keeffe, according to whom the three new Directives on the right of residence create "a class of second-rate Community citizen" and a dangerous precedent. See O'Keeffe, D., "Comments on the Free Movement of Various Categories of Persons", *Free Movement of Persons in Europe...*, op.cit., pp.515-520, at 516. In fact it seems that such a limitation represents an interesting application of the differential treatment in relation to foreigners. A Member State could decide to limit the beneficiaries of its health care and social assistance systems, for instance excluding from their scope foreigners who come for studying. In this way, instead, it is the right of residence in the country that is limited. Therefore, the exclusion from the national welfare system is made at the border, not inside the country. However, perhaps it was also possible to imagine a co-ordination of the national welfare systems in such a way that the State of origin of the person would be responsible for social assistance benefits. This could be done at least within the limits of the benefits enjoyed in the Member State of origin by its own nationals, as is already done in relation to unemployment benefits when the nationals of one Member State go to another in search of work.

[273] Save in what concerns the requirement that the migrant national of a Member State has to have "normal" housing for his family, as provided in Article 10(3) of Regulation 1612/68. However, see, again, the ruling of the Court of Justice in case 249/86, Commission v. Germany (Re Housing Conditions) [1989] ECR 1263.

[274] Articles 1(2) of Directive 93/96/EEC on the right of residence for students, Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, and Directive 90/364/EEC on other nationals of Member States, "who do not enjoy this right under other provisions of Community Law."

The effect of the restriction is, in principle, limited to ascendants of students or their spouses when the former are third country nationals. Nationals of a Member State should, at least, be able to invoke the Directive on the general right of residence. The restriction does not seem particularly reasonable in view of the fact that, under the general requirements of the three Directives of 1990, it has to be proven that such relatives have medical insurance and will not need social assistance in the host Member State, in order to acquire the right of residence. Furthermore, according to Directive 93/96/EEC, the right of residence is limited "to the duration of the courses of studies in question". Thus, there is no great danger that the third country national relatives will stay permanently in the host Member State.[275]

Finally, relatives of migrant nationals of a Member State have the right to remain in the host Member State as long as that migrant, with whom they moved, has the right to remain there. However, relatives of nationals of a Member State may also acquire the right to remain in that new country, on a indefinite basis, once the national of a Member State with whom they moved acquires that right.[276] This is not the case for persons under the three 1990 residence rights Directives.[277]

c) Right to Work

According to article 11 of Regulation 1612/68:

"Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and

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[275] Note also that, according to Article 2(2) of all the three sister Directives of 1990 on the right of residence, Article 6 of Directive 68/360 (as well as Articles 3 and 9 of such directive) applies to pensioners and "other" nationals of a Member State, but not to migrant students and their families. Article 6 of that Directive establishes (1) that the beneficiaries of free movement have the right to have a residence permit valid throughout the territory of the Member State, that residence permit being valid for at least five years from the date of issue and automatically renewable. Moreover, (2) breaks in residence not exceeding six consecutive months and absence on military service shall not affect the validity of the residence permit. The difference could be seen as negative for the situation of students, if they have to fulfil their military duties in their country of origin. However, if such situation really happens, it seems clear that, when they are able to retake their studies, they should be able to obtain again such residence permit.

[276] Article 3 of Regulation (EEC) No 1251/70 of the Commission on the right of the workers to remain in the territory of a Member State after having been employed in that State, OJ L 142/24 of 30/6/1970, and Article 3 of Council Directive 75/34/EEC concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, OJ L 14/10 of 20/1/75.

[277] In any case, again, if a national of a Member State cannot benefit from the right of residence under Directives 90/365 or 93/96, he can always remain in the other Member State under Directive 90/364 - the Directive on the "general" right of residence. But, as already mentioned, to benefit from this latter Directive he has to prove that he has medical insurance and sufficient resources not to need social assistance in the host Member State. The fact of the matter is that no such requirement exists in the Commission Regulation 1251/70, nor in Council Directive 75/34, (quoted supra) concerning the right of employed and self-employed workers, respectively, to remain in another Member State after having worked there.

those of the children who are under the age of 21 years or dependent on him shall have the right of take up any activity as an employed person throughout the territory of that same Member State, even if they were not nationals of any Member State."[278]

In the Gül case,[279] the Court defined this right in relation to a third country national husband of a British worker employed in Germany. Gül was a Cypriot graduate who had been allowed to practice medicine in Germany for a limited period to gain expertise and qualifications, with the understanding that, when his training was complete, he would go to work in another country. Instead, when that period was over, he asked permission to work as a doctor in Germany. The German authorities refused the request on the grounds that article 11 only gave him the right of access to the general employment market. The Court rejected this view, holding that the provision included the right to carry out, as an employed person, any occupation for which he had the required qualifications.[280] In practice, to this extent, he had to be accorded equal conditions to those of German nationals.

However, the relatives of the worker can only work as employed persons, not as self-employed persons, which is rather odd. Especially regarding third country nationals, as they do not benefit (directly) from the free movement of services[281] or establishment. As a result of this, Gül could not work for himself but only for someone else, which is somewhat strange for a doctor.[282] He could work for an hospital, but could not work in a self-employed capacity. To this extent, if he had come from another Member State (where he had obtained the professional qualifications), he would have an incentive to go back there, together with his wife. This would be contrary to the objective of free movement of persons.

In the meantime, it may be noted that all three of the 1990 Directives on the right of residence entitle the spouse of the migrant and their children (who may move to the host Member State), to work there too - anywhere within its territory. It makes no difference if they want to work there as employed or self-employed persons.[283] It is strange that a worker's relative would have less rights than, for instance, a pensioner's relative. The former does not have a right to work as a self-employed person, while the latter does. It is submitted that it would be in the interest of the coherence of Community Law to grant the right to work as a self-employed person also to the worker's relative.

Furthermore, it could also be argued that, as long as third country nationals are within the scope of Community Law, they should not be discriminated against on the

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278 Emphasis added.

279 Case 131/85, Emir Gül [1987] ECR 1573.

280 The Court even said that he could rely on Article 3(1) of that Regulation.

281 The worker's third country national relatives may benefit from the right to provide services, but only under the Court's rulings in Rush Portuguesa and Van Elst (quoted supra), which are clearly of a quite limited interest for a person residing in the host Member State. See Peers, op.cit., at 308.

282 Another example of a case where a Community right to work in a self-employed capacity would be denied is a 19 year old Tunisian girl who is a shoe mender, and lives in Belgium with her French father who is employed there.

283 Second phrase of Articles 2(2) of all three Directives 90/364, 90/365 and 93/96.

grounds of nationality.[284] Thus, third country national relatives of migrants who are nationals of a Member State should be considered to be entitled under Community Law to have their diplomas recognised in another Member State, in identical conditions to those of a migrant national of a Member State.[285] This would be coherent with the Gül ruling and with the objective of free movement of nationals of Member States (their relatives primarily entitled to move under Community Law).

Finally, it may be noted that, although dependent ascendants of a migrant national of a Member State (and of the migrant's spouse) may move with the latter to another Member State, they are not entitled to work there, whatever the title under which that migrant is protected by Community Law may be.

d) Right to Education

Article 12 of Regulation 1612/68 provides that:

> "The children of a national of a Member State who is, or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory (...)" .

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[284] This could be based in Article 6 of the EC Treaty or, eventually in Article 7(2) of Regulation 1612/68, inasmuch as it is relevant for the integration of the migrant national of a Member State, to whose family the relevant third country nationals belong. Alternatively, Article 7(2) could be applicable following the Reed doctrine, in case the relative of a national of a Member State could obtain such recognition.

[285] See also Peers, who maintains that after the Van Elst ruling (case quoted supra) "it seems likely that Member States will not be able to bar companies from using third-country nationals to provide services by refusing to recognise qualifications or experience gained in the Community." See Peers, op.cit., at p.306. Note, meanwhile, that the recognition of diplomas obtained in a third country was already addressed by the Court of Justice, but only as far as nationals of a Member State are concerned. See case C-319/92 Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein [1994] ECR I-425; and case C-154/93, Abdullah Tawil-Albertini v. Ministre des Affaires Sociales [1994] ECR I-451. The Court considered in both cases that diplomas of nationals of a Member State obtained in a third country (in Turkey and Lebanon, respectively) do not have to be recognised in another Member State under Directive 78/686/EEC of 25/7/1978 concerning mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, OJ L 233/1 of 24/8/1978. The first case concerned the situation of an Italian national who held a diploma in dentistry awarded in Turkey and had previously been authorised to exercise in Italy. Holding a diploma obtained in a third country, he had none of the qualifications mentioned which according to Directive 78/686 had to be automatically recognised. However, the German authorities had accorded to him the status of dental practitioner and he could practise there as a self-employed dentist. Therefore the Court ruled that the German authorities could not refuse him appointment as a dental practitioner of a social security scheme on the grounds that he did not complete a preparatory training period required by the legislation of the host Member State. They had to examine whether and to what extent his experience (which was, in fact, obtained because he hold such a diploma) was equivalent to that required by the host Member State. Otherwise Article 52 would be violated. See paragraphs 27 to 29 of case Haim, quoted supra. One could conclude that experience obtained by holding a diploma of a third country may be relevant for Community Law purposes. Nevertheless, it was also important in this case that the person concerned had already been admitted to work as a dental practitioner in the host Member State.

This article has been broadly interpreted by the Court of Luxembourg and, naturally, third country national children of workers who are nationals of a Member State benefit from that case-law. One example is the Michael S. case.[286] There, the Court included in the scope of that article the right to special education and rehabilitation of a paraplegic child of an Italian employed in Belgium. However, in itself the article is restrictive as it only applies to children and not other descendants of the workers nor to any descendants of his or her spouse only.

Another issue is to know whether a child, being a student in the school of a Member State where his or her parent worked, may remain there even if the parent leaves to go to another Member State. It is not clear what the judgment of the Court on this case would be. Yet, two arguments can be put forward in favour of the existence of the right to remain. One is based on the reasoning that to deny such a right would indirectly violate the principle of non-discrimination against the worker himself. The other is that it should be considered as already included in article 7(2) of Regulation 1612/68, to be analysed below.

Concerning the right of education of children of self-employed persons, even though no rule of positive Community Law explicitly recognises it, in order to ensure an effective right to the freedom of establishment of their parents, it should be understood as included within their right of residence.[287]

Finally, it must be noted that in the Gaal case[288] the Court ruled that the definition of children for the purposes of the above quoted Article 12 of Regulation 1612/68, is not subject to the same conditions of age or dependency as are the rights governed by Article 10(1) and Article 11 of the same Regulation - which deal with the right to enter, to reside and to work in the host Member State.

e) Social Advantages[289]

Article 7(2) of Regulation 1612/68 states that in the territory of a Member State a worker who is a national of another Member State :

"Shall enjoy the same social and tax advantages as national workers."

In the Even case,[290] the Court stated that these should be understood to cover all benefits that,

> "whether or not linked with a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community."

In this way the Court was able in Deak[291] to consider that the refusal by the Belgium authorities, on the sole grounds of nationality, to grant a young Hungarian a special

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286 Case 76/72, Michael S. v. Fonds National de Reclassement Social des Handicappés, [1973] ECR 457.
287 See Oliver, op.cit., p.71.
288 Case C-7/94, Landesamt für Ausbildungsförderung Nordrhein-Westfalen v. Lubor Gaal, [1995] ECR I-1031.
289 See O'Keeffe, D., "Equal Rights for Migrants: the Concept of Social Advantages in Art.7(2), Regulation 1612/68", *YEL*, Vol.5, 1985, pp.93-123; and Steiner, op.cit., p.218.
290 Case 207/78 Ministére Public v. Even [1979] ECR 2019.
291 Case 94/84, Office National de l'Emploi v. Joszef Deak, [1985] ECR 1873 at 1881.

employment benefit for youngsters leaving the school was contrary to that Article.[292] Other cases have concerned only nationals of a Member State but the rulings can also be applied to third country nationals, insofar as they are protected by the freedom of movement of workers. In other cases the Court ruled that members of the worker's family had the right: to be granted reductions on rail fares to which large families are entitled,[293] to obtain interest loans from a public bank[294] and to receive non-contributory age allowances.[295] With respect to all those matters, the members of the family should be treated in the same way as relatives of a national of the Member State in question. A case which has yet to be decided will examine the conformity with Article 7 (2) of a social security aid intended to cover the funeral expenses of a family member which applies exclusively to funerals held in the Member State concerned.[296]

f) Social Security

As we have seen in section A of this chapter, Regulation 1408/71 on the social security of migrant workers applies to migrant employed or self-employed persons "who are nationals of one of the Member States or who are stateless persons or refugees, as well as to the members of their families and their survivors." In addition, it also applies to the survivors of employed or self-employed persons irrespective of the nationality of the latter, "where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States."[297]

In the Kermaschek case,[298] the Court held that members of the family of a worker may only claim derived rights under Regulation 1408/71 as worker's relatives;[299] not as former employed or self-employed persons. In this case a Yugoslavian woman, married to a German worker, relied on her status as his wife and on the social security contributions paid while she was in the Netherlands, to ask for an unemployment benefit in Germany. If the interpretation of the Court can hardly be challenged from the point of view of secondary Community Law, it seems rather difficult to sustain that the woman should not be allowed to receive the unemployment benefit, at least as long as Dutch law would entitle her to receive such a benefit if she resided in the Netherlands.

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292 Initially the question was put in the framework of Regulation 1408/71 on Social Security Coordination, but the Court held that the Regulation did not apply.

293 Case 32/75, Cristini v. SNCF [1975] ECR 1085.

294 Case 65/81, Reina v. Landeskreditbank Baden-Württemberg [1982] ECR 33.

295 Case 157/84, Frascogna v. Caisse des Dépots et Consignations, [1985] ECR 1744.

296 Case C-237/94, J.O'Flynn v. Adjudication Officer. This case is still pending and no date has yet been fixed for a hearing.

297 Article 2 of the Regulation.

298 Case 40/76, Kermaschek v. Bundesanstalt für Arbeit, [1976] ECR 1669.

299 See also case 147/87 Zaoui, (paragraphs 11 and 12); and case C-206/91, Ettien Koua Poirrez; both quoted supra.

2 - THE SPOUSE'S RIGHT OF RESIDENCE - Specific Situations

The right of residence in the host Member State of the spouse of a migrant national of another Member State has already been examined in general terms.[300] Two issues will now be developed. First, the legal consequences of the divorce of the couple on the residence status of the third country national spouse, when they are living in the host Member State. Secondly, the legal position of this kind of couple (of mixed nationality and moving to a different Member State) when they are not married, but live together as a family.

These situations will be examined not only from the perspective of the rules of Community Law, but also with reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter E.C.H.R.] and to the case-law of the Commission and Court of Human Rights of Strasbourg. Particular attention will be given to the analysis on the conformity with the E.C.H.R. of Community Law rules on the matter.

The Community Treaties do not explicitly provide for a general protection of human rights in the application and adoption of Community rules. However, the Court of Justice of the European Communities has repeatedly held that:

> "fundamental human rights form an integral part of the general principles of Community Law, the observance of which is ensured by the European Court of Justice"[301]

It has also declared that :

> "International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community Law"[302]

The European Convention of Human Rights is one of such international treaties. In fact, the Court has often used the Convention rules as a standard to review the legality of acts under the scope of Community Law.[303] Moreover, Article F of the Treaty on European Union provides that:

> "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (...) and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

Thus, there is a strong case for sustaining that the Law of the European Union, including Community Law, is subject to the rules of the E.C.H.R. Therefore, the Convention will be used in the analysis of certain situations related to Community Law.[304]

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[300] See also, on the legal status of the spouse of the migrant worker who is national of a Member State, Steiner, op.cit., pp.211-2.

[301] See, for instance, Case 29/69, Stauder [1969] ECR 419; Case 4/73, Nold (II) [1974] ECR 491; Case 44/79, Hauer [1979] ECR 3727; and Case 136/79, National Panasonic [1980] ECR 2033.

[302] Second Nold case, quoted before, at paragraph 13 of the judgment, at p.507.

[303] See, e.g., Case 36/75, Rutili [1975] ECR 1232 and Case 63/83, Kirk, [1984] ECR 2718.

[304] However, two important issues for this analysis will not be examined. One is the precise relationship between Community Law and the E.C.H.R. The other is whether the situations I will examine here come under the scope of Community Law, or belong, instead, to the field of competence of national legal orders. In this text it will be assumed that, in the application of Community Law, the standards of the European Convention of Human Rights are to be respected and that the situations under examination come under

As explained in section B of chapter 1, the Commission and the Court of Human Rights of Strasbourg have considered that the right to residence or to enter a Contracting Party, as well as the right of asylum and the freedom of expulsion, are not, as such, protected by the E.C.H.R.[305] However, these organs have also considered that migration measures adopted by a Contracting State may put certain rights protected by the Convention at stake. I believe that such a risk may exist in the situations discussed below.[306]

a) the divorced spouse of the worker

The issue is as follows. Two persons get married. One is a national of a Member State and the other is not. They move from one Member State to another under the Community rules on free movement of persons. What are the legal consequences for the

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the scope of Community Law. It may be doubtful whether the Court of Justice would fully agree with these presumptions. However, it can be argued that they are valid. Moreover, it should be noted that the EC Commission proposed the accession of the European Communities to the E.C.H.R., on which an opinion on the compatibility with the EC Treaty was requested by the Council to the EC Court of Justice (Opinion 2/94, not yet adopted). See by the International Commission of Jurists, *The Accession of the European Communities to the European Convention on Human Rights*, Position Paper, Geneva, 1993. On human rights and Community Law see also Capelletti, M. & Golay, D. "The Judicial Branch in the Federal and Transnational Union: Its impact on Integration" in *Integration Through Law: Europe and the American Federal Experience*, Capelletti, M. , Seccombe, M. & Weiler, J. (eds.), Berlin, Walter de Gruyter, 1986, Vol. 1, Book 2, pp.261-351; Clapham, A., *European Union - The Human Rights Challenge*, vol. I - *Human Rights and the European Community: A Critical Overview*, Baden-Baden, Nomos, 1991, particularly at pp.33-55; Coppel, J. & O'Neil, A., "The European Court of Justice: Taking Rights Seriously?", *CMLRev*, Vol.29, 1992, pg.669 (this title echoes a previous book of Dworkin, Ronald , *Taking Rights Seriously*, London, Duckworth, 1978); Gaja, G., "Aspetti problematici della tutela dei diritti fondamentali nell' ordinamento comunitario", *Rivista di Diritto Internazionale*, Vol.71, 1988, No.3, pp.574-589; Jacobs, F.G., "The Protection of Human Rights in the Member States of the European Communities: The Impact of the Case-Law of the Court of Justice", in *Human Rights and Constitutional Law: Essays in Honour of Mr. Justice Walsh*, O'Reilly (ed.), Dublin, Round Hall P., 1992, p.243; Jacobs, F.G., "European Community Law and the European Convention of Human Rights", *Institutional Dynamics of European Integration - Essays in Honour of Henry G. Schermers*, by Curtin, D. & Heukles, T.(eds.), Vol. II, Dordrecht, Martinus Nijhoff, 1994, pp. 561-571, at pp. 564-565; Lang, J.T., "The Sphere in Which Member States Are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles", *LIEI*, 1991, No.2, pp.23-35; O'Leary, S., "The relationship between Community citizenship and the protection of fundamental rights in Community law", *CMLRev*, Vol.32, 1995, No.2., pp.519-554; Régis, Brilliat "La participation de la Communauté européenne aux conventions du Conseil de l'Europe", *Annuaire Français de Droit International*, 1991, Vol.XXXVII, pp.814-832; Schermers, H.G., "The European Communities Bound by Fundamental Rights", *CMLRev*, Vol.27, 1990, No.2, pp.249-258; Weiler, J., "Eurocracy and Distrust: Some Questions Concerning the European Court of Justice in the Legal Order of the European Communities", *Washington Law Review*, Vol. 61, July 1986, pp.1103-1142; Weiler, J. & Lockhart, N. "'Taking rights seriously' seriously: the European Court and its fundamental rights jurisprudence - part I", *CMLRev*, Vol.32, 1995, No.1, pp.51-94, and part II in *CMLRev*, Vol.32, No.2., 1995, pp.579-627. See also Mancini, G.F., "The Making of a Constitution for Europe", *CMLRev*, Vol. 26, 1989, p.595.

[305] See, e.g., Commission decision of 24/4/1965, in Application No. 1855/63, Yearbook of the European Convention of Human Rights, Vol. VIII, p. 203, and judgment of the European Court of Human Rights in Abdulaziz et al., of 28 May 1985, Series A, No. 94, p.67. See, furthermore, section B of chapter 1.

[306] See also Steiner, op.cit., p.213.

residence status of the third country national spouse[307] in the new Member State if the couple divorces? A relationship between two persons is always a delicate matter. Interference by the law is an even more delicate matter. Therefore, no jurist can overlook the position in which a spouse may be put by the effect of the law. The third country national spouse may be in a very critical position if her[308] residence status is completely dependent on that of the community spouse. There is, in fact, a real danger that the spouse national of a Member State may abuse his or her power in requesting the divorce.

If the third country national spouse is unable to obtain an autonomous right of residence, she can find herself in a nightmare situation, obliged to accept any demand made by her husband. She may also go to Court and obtain a decree of divorce, i.e. in which the husband is considered the responsible party for the failure of the marriage. However, if she is then expelled from the country in which she was already integrated, it is difficult to sustain that her basic human rights were respected.[309] This situation harms the normal dynamics of the relationship of a married couple. The power of each of the spouses to end the relationship is artificially unbalanced. This grossly violates the right to freedom of marriage (and divorce) and may expose the spouse of the worker to a degrading situation. The same is true for any legal regime which allows for such a situation, providing no protection for the third country national spouse.[310]

(i) Community Law perspective

On two occasions the Court of Justice of the European Communities has ruled on a case concerning the position of divorcees under the Community Law on free movement of persons.[311]

The first was the Diatta case.[312] Here, the Senegalese wife of a French national, who lived and worked in Berlin, was denied a renewal of her residence permit in Germany, because she had moved out of the family home and intended to divorce her husband. The Court considered that Article 10 of Regulation 1612/68,[313] could not be interpreted in a restrictive way, requiring cohabitation in order for a wife of a national of a Member State to have the right of residence in the Member State where her husband was working.

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[307] This issue is also important for divorcees who are nationals of a Member State, but only to the extent that they are not able to acquire a right of residence on their own.

[308] Or his, of course. For the sake of simplicity here I will refer to the (still) nowadays prevailing situation, in which the wife follows the husband to a new country. See, however the Singh case, quoted infra.

[309] In particular, if she cannot return to the previous Member State of residence. Such impossibility may be also due to the fact that she did not live in one Member State long enough to acquire the right of residence there or the nationality of that country.

[310] See for the legal and social situation in the United States the excellent Article by Anderson, Michelle J., "A License To Abuse: The Impact of Conditional Status on Female Immigrants", *The Yale Law Journal*, Vol.102, 1993, No. 6, pp.1401-1430.

[311] In the Kus case (case C-237/91, Kus v. Landeshauptstadt Wiesbaden [1992] ECR I - 6781) the Court of Justice also dealt with the situation of a Turkish divorcee. However, this case is not very interesting for the purposes of this sub-section, namely because it was dealt with by employing rules adopted in the framework of the Association Agreement with Turkey. This Agreement and this case will be analysed in the next chapter.

[312] Case 267/83, Aissatou Diatta v. Land Berlin [1985] ECR 567.

[313] Especially paragraph 3 of that Article, quoted supra, when requiring the worker to "have available for his family housing considered normal for national workers".

According to the Court, the German immigration authorities could not regard their marital relationship "as dissolved so long as it had not been terminated by the competent authority."[314]

The Court did not expressly deal with the argument of the Commission that a person, acquiring the right of residence under the above mentioned Article 10, retains that right even she ceases to be a part of the worker's family. This would probably be a too liberal a view for the Court to accept, as its interpretation of the article's expression "install with the worker", in a certain sense, open-minded.

Although the Court did not take an explicit stand on the position of divorcees, it did take an implicit position by interpreting Article 11 of the same Regulation. This provision grants the right to work in the territory of the Member State to which the family moved, to some relatives of the migrant worker (who is national of one Member State). The relatives with the right to work are those referred to in Article 10 of the Regulation - namely the worker's spouse. The Court considered that while Article 11 granted the right to work, it did not imply the granting of a right of residence independent from that of Article 10.[315] Nevertheless, Article 11 was invoked to allow Diatta to stay in Berlin, despite the fact that she no longer cohabited with her husband. The Court, when interpreting Article 10, had already decided that she could remain there. Thus, the Court's ruling on Article 11 seems to be useful insofar as it excludes an autonomous right of residence for divorcees.

This judgment was sharply criticised by Weiler, who used two lines of reasoning. On one hand, he pointed out that the restriction on the rights of divorcees has a negative impact on the free movement of workers. The decision of a couple to move to another Member State will be negatively affected by the fear of the third country national spouse that, in the new Member State, she may lose her right of residence if she divorces. The interpretation of the Court did, therefore, "act as an impediment to truly effective free movement".[316] It may be added that the objective of the Community rules on free movement is, in principle, to make it as easy for workers to move between different Member States, as it is between different regions of the same State. Only this way will the Community labour market function satisfactorily. The automatic removal of the right of residence of the worker's spouse, as soon as their marriage ends, does not contribute to

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[314] Paragraph 20 of the judgment.

[315] Apparently, the Commission took this ruling into consideration when it made its proposal to amend Article 11 of Regulation 1612/68, quoted supra. A second paragraph would be included in Article 11 providing that: "The death of the worker on whom the members of the family are dependent or the dissolution of marriage shall not affect this right" (the right to work in the territory of the Member State). The objective of the proposed amendment was stated as being to "prevent serious social and moral consequences for the non-Community widow and divorced wife as well as for any other members of the family depending exclusively on her". See Proposal for a regulation amending Council Regulation 1612/68, COM (88) 815 final, SYN 185, OJ C 100/6 of 21/4/1989. Likewise, the European Parliament suggested extending the Commission's draft amendment, in which the dissolution of the marriage of the worker would not affect the right of the worker's ex-spouse to reside and work in the territory of the host Member State, to "the de facto separation of the couple". See the resolution adopted by the European Parliament on 14 February 1990, OJ C 68/87 of 19/3/1990, amendments Nos. 11 and 64, and 68. These proposals of the Commission and the Parliament, were not approved by the Council.

[316] See Weiler, Joseph H. "The Judicial Protection of the Human Rights of Non-EC Nationals", in *EJIL*, Vol. 3, 1992, No.1, pp.65-89, at p.89.

this objective. Indirectly, the worker is put in an unprivileged position in relation to his or her fellow workers who move inside the same country.

Weiler's second point was that the Court did not deal with the issue of Diatta's human rights. He believes, and rightly so, that this is unacceptable. The Court, apart from considering the correct interpretation of the Regulation, should also have examined whether it conformed with fundamental human rights.[317] In fact, the Court should have examined whether Diatta's human rights were respected, namely as far as her human dignity[318] and her right to family life were concerned.[319] Furthermore, from a broader perspective, Diatta should not have been treated as a mere instrument for the accomplishment of the Community objective of freedom of movement of nationals of Member States. Attention should have been paid to her as a person, who is entitled to protection of fundamental human rights.[320] As Weiler puts it :

> "There is an inevitable violation of human dignity in a legal construct which insists on seeing an individual not as an end in itself, but solely as a means and instrument at the service of other persons and other goals. (...) Once an individual, for whatever reason or on whatever basis, comes within the field of application of Community law, his or her fundamental rights must be guaranteed."[321]

The second case concerning a divorcee in this type of situation was that of Surinder Singh.[322] The Court avoided dealing with the issue of the position of divorcees very carefully, declaring that this issue had not been included in the request for a preliminary ruling. This clearly contrasts with the usual behaviour of the Court, which "is not formalistic with respect to the formulation of requests for preliminary rulings."[323]

The case concerned the deportation order of Mr. Surinder Singh, an Indian national, whose wife was a British national. They had lived together for two years in Germany, from 1983 to 1985, where they were employed. Returning to the United Kingdom, at the end of 1985, they opened a business. Later, their marriage failed and a *decree nisi* of divorce was pronounced against Mr. Singh in proceedings brought by his wife. The British authorities immediately revoked his right to remain in the country (as the spouse of a British national). Even before the pronunciation of the decree absolute of divorce, he faced a deportation order. The deportation order referred to his situation

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317 As he states: "(...) simply to construe the Regulation in accordance with the wishes of the Community legislator is not what judicial protection of human rights is all about." Weiler, idem., p.88.

318 Recognised in Article 1 of the European Parliament "Declaration of Fundamental Rights and Freedoms", according to which "Human dignity shall be inviolable". The declaration of the European Parliament was approved by a resolution of 12 April 1989, OJ C 120/51 of 1989.

319 If, for instance, she had children in Germany.

320 Even when analysing the situation in the light of a teleological interpretation of the rules on free movement of workers. An optimal interpretation of these rules would entail that the persons protected by them could not have their fundamental human rights put in jeopardy in the host Member State. See, by analogy, in next chapter the considerations of Advocate General F.G. Jacobs in case C-168/91, Christos Konstantinidis [1993] ECR I-1191, notably paragraph 46 of his opinion.

321 Weiler, "The Judicial Protection of the Human Rights...", op.cit. p.88.

322 Case C-370/90, The Queen and Immigration Appeal Tribunal and Surinder Singh, *ex parte*: Secretary of State for the Home Department, [1992] ECR I-4265.

323 Schermers, H.G. & Waelbroeck, D. "Judicial Protection in the European Communities", Deventer, Kluwer, 1992, p.425.

before the final decision on divorce. Thus, in the proceedings brought by Mr. Singh against the deportation order, the question was referred for a preliminary ruling of the Court of Justice as if he was still married. However, by the time the preliminary ruling was sought, the decree absolute of divorce had already been pronounced. Therefore, the Court of Justice stated that:

> "(...) although the marriage was dissolved by the decree absolute of divorce delivered in 1989, that is not relevant to the question referred for a preliminary ruling, which concerns the basis of the right of residence of the person concerned during the period before the date of that decree."[324]

One cannot but admire how the legal niceties of the proceedings forced the Court of Justice to give an answer to a question which was no longer important for the case in hand. In fact, the British immigration authorities wanted to deport Mr. Singh because his marital relationship with a British national had finished. Their decree absolute of divorce was pronounced even before the immigration case reached the British highest court. However, the latter court in its preliminary ruling refers to Mr. Singh as married person - as a person in a normal, effective marriage.

Consequently, it seems clear that the British authorities, after the Court of Justice's judgment, could simply make another deportation order, this time on the basis of the actual divorce. In this case, the preliminary ruling would have served only to delay the final decision, the decision on his personal situation - as a divorcee.

Thus, this ruling of the Court of Justice is important, but mainly regarding his (previous) situation as a married person. The Court declared that he had a right to reside in the UK, under Article 52 of the Treaty of Rome and under Directive 73/148/EEC[325] - both on freedom of establishment. They were invoked because his wife, on their return from Germany, had set up a business in the UK. Thus the Court stated that:

> "A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on return to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were at least not equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State."[326]

Perhaps I am wrong, but there seems to be a false comparison here. If a person is not to be deterred from leaving his or her country of origin, he or she has to be given the same advantages[327] as if he or she had stayed there, rather than the advantages of staying abroad. These are only relevant if, conversely, the person is to return from abroad to his or her country of origin - which was precisely the case at stake. Although the Court reached

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[324] Paragraph 12. Note also that the Court never referred to the Diatta case, even though, when the deportation order was made, Mr. Singh was in a similar position to hers. See supra the analysis of the Diatta case.

[325] On the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provisions of services, quoted supra.

[326] Case C-370/90, quoted supra, paragraph 19.

[327] For instance, as far as the residence status of his or her close relatives is concerned.

a correct conclusion regarding the position of married persons, it may have failed to address the problem in a proper way.

This case is typical of what could perhaps be called a second generation of situations in the freedom of movement. In the first generation, people moved from their country of origin to another Member State. In the second generation, they move from the latter, either back to their country of origin, or to a third Member State. Obviously, Community Law has to protect all these situations alike. The Court, however, used a reasoning valid for the "first generation" of situations only, considering how a person "might be deterred from leaving his country of origin". This aspect, in the case, appears to be irrelevant.[328]

Furthermore, there does not seem to be a contradiction between the judgment of the Court and British immigration rules; except in relation to the implicit restatement of the Diatta ruling. Apparently Mr. Singh could have been allowed to stay in the UK as the spouse of a British national. Thus, there is no contradiction between the ruling of the Court in this case (and, hence, of Community Law) and the application of the British Immigration rules. The only difference may be that the deportation order of Mr.Singh precedes the final decision on his divorce. This may not conform with the Diatta ruling. However, probably because of the fact that the decree absolute of divorce had already been pronounced, the Court did not deal with that issue.

Thus, if I am right, the Court addressed neither the most important issue in question - the position of a divorcee - nor the situation in which the disputed deportation order was made, that of Mr. Singh with a decree nisi of divorce.

(ii) E.C.H.R. perspective

The rules of the European Convention of Human Rights, as interpreted by the Commission and Court of Human Rights, can only be of little help to alien divorcees. Alien divorcees may be given the right to stay in the country of residence after the end of their marriage, but only if their expulsion entails a violation of Article 3 or Article 8 of the E.C.H.R. Divorcees are not, as such, the object of special consideration by the Commission and Court of Human Rights. The circumstances of their cases may, however, fulfil the general conditions required to declare a violation of the E.C.H.R. They may, for instance, have children from the ceased marriage living in the relevant country.

Such was the case of Mr. Abdellah Berrehab, a Moroccan who married a Dutch woman, Mrs. Sonja Koster, in October 1977.[329] He then was granted permission to stay in Netherlands "for the sole purpose of enabling him to live with his Dutch wife". The couple had a child in August 1979, whose name was Rebecca. However, their marriage did not work and three months later their divorce was granted at the request of Mrs. Koster. The Court appointed her guardian of the child. Simultaneously, Mr. Berrehab was appointed auxiliary guardian of his daughter and ordered to pay maintenance costs for the child. At the birth of Rebecca, both parents agreed to ensure that the child would have frequent contacts with the father, which indeed seems to have been the case while Mr. Berrehab was in Netherlands.

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328 Although this was the problem in the Diatta case. However, there, the Court did not use a similar reasoning to rule on the Singh case, as perhaps it should have done.

329 Case Berrehab v. Netherlands, judgment of 21/6/1988, Series A, No. 138.

However, since he was no longer married to a Dutch citizen, he was deported to Morocco in 1984, after having fought the deportation order in Court, with no success. In that year, Rebecca and her mother went to visit Mr. Berrehab in Morocco for two months. He was only allowed to go back to Netherlands in the summer of the following year, 1985. There, he remarried Mrs. Koster and was again granted a residence permit "for the purpose of living with his Dutch wife and working during that time".

During the procedures before the Commission and Court of Human Rights of Strasbourg, Mr. Berrehab and his daughter alleged that his expulsion violated their family life, as protected by Article 8 of the E.C.H.R. The Commission agreed with them. The Court analysed the problem, according to the now classical three phase procedure. First, the Court held that Mr. Berrehab and his daughter Rebecca did have a family life. Although they no longer lived together, the fact that he visited her four times a week, for several hours each time, was considered enough to prove the existence of their family life. Secondly, the Court declared that the refusal to grant Mr. Berrehab a new residence permit and his resulting expulsion were an interference with the family life between him and his daughter. It held that such measures "prevented the applicants from maintaining regular contacts with each other", these contacts being "essential as the child was very young".[330] Finally, the Court examined the Dutch government's justification for such an interference. The Court recognised that the expulsion measure corresponded to a legitimate aim, the preservation of the country's economic well-being (the regulation of the labour market, taking into account the population density)[331] but not the aim of prevention of disorder, as the Dutch government had claimed and to which the Commission had agreed to.[332]

Nevertheless, the Court held that a proper balance between the interests in question had not been achieved. Therefore, the behaviour of the Dutch government violated Article 8 of the E.C.H.R. According to the Court, the measures adopted against Mr. Berrehab were not "necessary in a democratic society",[333] as they did not correspond to a pressing social need and were not proportionate to the legitimate aim pursued.[334] These are quite important criteria to take into account in migration cases, as in other cases of the restriction of the exercise of fundamental human rights.

To find that the Dutch government did not respect those criteria in the Berrehab case, the Court gave special consideration to 3 factors. First, for several years there were very close ties between Mr. Berrehab and his daughter. Thus, "the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties", especially as the child was very young.[335] Secondly, Mr. Berrehab was already installed and integrated in the Netherlands: he had lived there for several years and he had a home

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330 Idem, paragraphs 22 and 23 of the judgment.

331 One may wonder what the assessment of the Court would be if Mr.Berrehab were a small entrepreneur creating jobs for Dutch nationals.

332 Paragraph 79 of the Commission opinion.

333 As required in the second paragraph of Article 8 of the E.C.H.R.

334 Note also that the European Court of Human Rights has often declared that governments have a margin of appreciation, but they have to achieve a fair balance between the interests of the community's well-being and the effective enjoyment by the individual of the rights protected by the E.C.H.R. This was once more confirmed in case Lopez Ostra, judgment of 9/12/1994, Series A, Vol.303.

335 Paragraph 29 of the judgment in case Berrehab, quoted supra.

and a job there. Last, but not least, the "Government did not claim to have any complaint" against Mr. Berrehab.[336]

It is interesting to mention that Dutch law had already tried to protect divorcees who are third country nationals. However, Mr. Berrehab did not meet the legal requirement of three years of marriage and one year of residence with his wife in the Netherlands.

With the help of this case, let us now try to assess the precise extent to which Article 8 of the E.C.H.R. may protect divorcee spouses.

First, it seems reasonable to claim that such protection would result in the reverse situation of the Berrehab case. That is to say: if the male spouse was Dutch and the female spouse was alien.[337] If they divorced, the latter, as mother of their child, would in principle be appointed her (main or sole) guardian. Meanwhile, the father would be in a secondary position - probably having the right to visit the child regularly. In this case, it would be in the interest of the (national) father that his (alien) ex-spouse remained in the country. Otherwise, his ex-spouse would take their daughter with her, preventing him from maintaining frequent contact with the child. Therefore, the alien ex-spouse should be allowed to stay in the country.[338] This would be an indispensable condition if the right of the father to maintain his relationship with his daughter is to be respected.[339]

Furthermore, a careful application of the Berrehab solution should avoid discrimination between men and women in the context of post-divorce situations. Modern family laws in European countries share the view that in the event of divorce, when deciding the parent with whom the children should stay, the factor to take into consideration is the

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[336] Idem. His only defect was to be a foreigner. Probably, for this reason the Court disregarded the Dutch government's claim that its behaviour in the case pursued the legitimate aim of prevention of disorder.

[337] For the purposes of this thesis: if she was not a national of a Union Member State. Similar comments are valid for nationals of the Community where they cannot obtain an autonomous right of residence under the relevant Community rules.

[338] This is only coherent with the Berrehab judgment, quoted supra. If a Dutch mother should not be obliged to follow the Moroccan father abroad (taking the child with her), a national father should not be obliged to do so either, in order to retain his ties with his daughter. Obviously, the situation would become more complicated if the mother no longer wanted to stay in the country. However, this problem is already outside the scope of this thesis.

[339] Actually, as in the Berrehab case, another right is at stake here, even if it is not expressly mentioned. This is the right of the national parent to remain in his own country and maintain family life with his or her child. Contrary to when family ties continue between the relevant persons, the Commission and Court of Human Rights of Strasbourg never considered the possibility of the divorcee going abroad to permit his/her (alien) ex-spouse to retain ties with their common child. Once divorced, the ex-spouses no longer have a family relationship. Thus, the "elsewhere test" (according to which there is no violation of the E.C.H.R. if the family can live together in some other country) cannot be applied here, in the situation regarding the two ex-spouses. See van Dijk, P. & van Hoof, G. J. H. *Theory and Practice of the European Convention of Human Rights*, Deventer, Kluwer, 1990, p. 389. However, such a test, could eventually be applied by the Court in relation to the family life of the wife and child, thus considering whether the national father could move to the mother's country to keep contacts with their common daughter. Apparently, an "elsewhere test" in this situation would be coherent with other cases already decided by the Court and Commission of Human Rights. However, the merits of its use on such a case would be highly questionable. In a way, it shows, once again, how the "elsewhere test" is open to criticism. See, in general terms, the analysis of Article 8 of the E.C.H.R. made in section B of Chapter 1.

interest of the children themselves. This usually means that the children stay with the mother, while the father has only the right to be with them for short periods. It seems clear that, in the context of migration cases, no argument should be made to the detriment of the father[340] based on the sole fact that his family life with his children is restricted to the possibilities available for him after the divorce. It is well known that contacts between child and father are important for the psychological growth of the former.[341] Consequently, these contacts should be protected.

Meanwhile, according to Article 8, a divorcee may be allowed to remain in the country for other family reasons, not only because of the circumstances specifically related to the divorce. That may happen, for instance, because he or she has a very close connection with that country, it is very difficult or impossible for him or her to live in another country and he or she has "family life" with other relatives living in the country. Such justification is particularly important for divorcees without children. An alien divorcee with children entitled to reside in the country concerned, should have fewer difficulties in persuading the government to give him or her an independent residence status.

However, the E.C.H.R., as interpreted up to now by the Commission and Court of Human Rights of Strasbourg, seems to offer little or no help to divorcees who have no relatives in the country - relatives with whom they could claim to have family life.[342] The only possibility for persons in this situation appears to rest in Article 3 of the E.C.H.R. Yet, it would be very difficult for them to make a case on these grounds before the Commission and the Court of Human Rights.[343] Nevertheless, the consequences of the expulsion should be considered carefully. This should include the examination of the situation of the person concerned in the country to which she should be sent, in order to assess the risk of inhuman treatment there.[344]

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[340] Or, to be more accurate, to the detriment of the parent who is not the (main) guardian of the children.

[341] Not to mention the latter.

[342] See, however, my argument in chapter 1, section B, that the right to private life (protected by Article 8 of the E.C.H.R.) may be at stake in cases of expulsion of aliens who do not have relatives in the country of residence.

[343] See supra Chapter 1, section B.

[344] According to this criterion, the case of Cancan, K., a 24 years old Turlish woman, should be carefully examined. At the age of 14 her father gave her in marriage to a man chosen by him. The marriage eventually broke down. Then, her father gave her to a compatriot immigrant in Germany, who took her there. This second husband seems to have treated her very badly, beating and raping her, as well as keeping her in chains for long periods. While she was with him, she suffered two miscarriages and was hospitalised several times. One day she finally found the courage to run away from her husband and then applied to remain in Germany. The relevant German law, however, required a period of three years of common residence (of the couple) before autonomous residence could be granted to her. She left her husband only two months before this three years limit. Thus, she faced the likely prospect of having to return to Turkey. Back to her father, again. See *L'Unità* of 12/8/1993.

b) the worker's partner (unmarried couple)[345]

(i) Community Law perspective

What rights do unmarried couples have according to Community Law regarding the free movement of persons? The following remarks concern the situation of unmarried heterosexual couples. However, to a certain extent they are also applicable to gay and lesbian couples. These couples face basically the same type of problems as unmarried heterosexual couples, as far as the right of residence of the third country national partner is concerned.[346]

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[345] See the way in which Member States protect the rights of unmarried couples in "National Family Policies in EC Countries in 1991", *European Observatory of National Family Policies*, Dumon,W. (Ed.), Brussels, Commission of the European Communities, 1992, at p.149. For developments on the same subject in 1992 see the report on that year, by Dumon, W. and Nuelant,T. (ed.), 1994, at pp.69-73. See also the issue of *Europe Sociale* on "The European Union and the Family", Brussels, Directorate General for Employment, Industrial Relations and Social Affairs, No.1, 1994.

[346] However, the position of homosexuals has a number of peculiarities also. For an overview of the legal issues concerned with the gay and lesbian situation regarding the E.C.H.R. and EC Law see, generally, Jessurun D'Oliveira, H.U. "Lesbian and Gays and the Freedom of Movement of Persons", in *Homosexuality: A European Community Issue, Essays on Lesbian an Gay Rights in European Law and Policy*, Waaldijk, K. & Clapham, A. (eds.), Dordrecht, Martinus Nijhoff, 1993, pp.289-316. See also Bovey, Mungo, "Out and out: UK immigration law and the homosexual", *INLP*, Vol.8, 1994, No.2, pp.61-63; Clapham, A. & Weiler, J. "Lesbian and Gay Men in the European Community Legal Order" in *Homosexuality: A European Community Issue...*, op.cit., pp.7-69; Heinze, Eric , *Sexual Orientation: A Human Right*, Dordrecht, Martinus Nijhoff, 1995, in particular at pp.175-8 and pp.196-208 (on jurisprudence of the European Court of Human Rights on Privacy and Liberty, respectively), p. 286 (on immigration) and pp.291-303 (on a model declaration of rights against discrimination on the basis of sexual discrimination); and Tanca, Antonio "European Citizenship and the Rights of Lesbian and Gay Men", in *Homosexuality: A European Community Issue...*, op.cit., pp.267-288, particularly at 281-3. For a quick but updated overview of the situation of gay and lesbians in Europe, as far as marriages and legal recognition of unions is concerned, see Lind, Craig, "Time for lesbian and gay marriages", *New Law Journal*, Vol.145, 20 October 1995, pp.1553-4. Following what was argued supra, in section B of chapter 1, the right to respect for private life, protected under Article 8 of the European Convention of Human Rights, should be considered to protect the relations of an homosexual couple, even in the context of migration cases. The Commission of Human Rights has considered that the relations between an homosexual couple do not give rise to the issue of family life, but of private life. Thus, it decided that the expulsion of an homosexual couple may constitute an interference with the right for respect of private life, if it is established that the couple cannot live elsewhere and that the connection with the expelling State is a fundamental element of the relationship. See Commission decision in Application No.9369/81, D&R, Vol.32, p.220. As far as Community Law on free movement of workers is concerned, the ruling of the Court on the Reed case (case 59/85, Netherlands v. Ann Florence Reed [1986] 1283) seems to apply to homosexual couples also. There the Court ruled on the definition of spouse included in Article 10 of Regulation 1612/68. The European Court considered that: "[i]n the absence of any indication of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in the regulation, it must be held that the term spouse in Article 10 of the Regulation refers to a marital relationship only." See paragraph 15 of the case. This ruling is analysed by D'Oliveira, op.cit., pp.299-301. See also the Roth report of 1994 on equal rights for homosexuals and lesbian in the EC, made on behalf of the European Parliament Committee on Civil Liberties and Internal Affairs, doc.ref. PE 206.256/fin, A3-28/94.

The situation of unmarried couples was addressed by Court of Justice of the European Communities in the Reed case.[347] This case concerned an unmarried British national, Ann Reed, who moved with her companion to the Netherlands so he could work there. She looked for work in that country, but without success. Miss Reed asked for a residence permit as a companion of a British worker. Mrs. Reed and her companion had a stable relationship of five years standing and the stability of their relationship was not questioned. However, her request for a residence permit was refused by the Dutch authorities. According to the relevant Dutch law, her situation lacked one of the legal requirements to grant her right of residence. This was the condition that the person residing in the Netherlands, with whom she had a de facto relationship, enjoyed a permanent right of residence there, i.e. an "unrestricted right of residence".[348] However, Mrs. Reed's companion was considered to have no such right of residence, since he held a residence permit restricted to five years, the minimum period required by Community Law for such a permit.[349]

She then invoked a Community right to live in the Netherlands, based on Articles 7 (prohibition of discrimination on the grounds of nationality[350]) and 48 of the Treaty of Rome, as well as on Article 10 of Regulation 1612/68.[351] In a preliminary ruling on the case, the European Court considered that:

> "In the absence of any indication of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in

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[347] Case 59/85, Reed, quoted supra.

[348] These persons would even include refugees. See the opinion of the Advocate General idem, case quoted supra, at pp.1284-5.

[349] In fact, the relevant EC provision, Article 6 of Council Directive 68/360/EEC, quoted supra, establishes that the residence permit is to be issued for at least five years from the date of issue. This permit is also automatically renewable on the production of evidence of identity and of documentary proof that employment will remain available to the worker in the state in question - see Article 4(3)(a) and (b) of the same Directive. Finally, it may be noted that, according to the Court of Justice, the source of the right to reside is not the residence permit itself, but the relevant EC Treaty provisions. As mentioned supra, the Court has ruled that secondary instruments of Community Law implementing Treaty provisions on free movement of persons do not create new rights for the persons protected by EC Law. They merely gives closer articulation to the Treaty provisions, by determining the scope and detailed rules for the exercise of the rights directly conferred by the Treaty. See case 48/75, Procureur du Roi v. Royer [1976] ECR 497, paragraphs 23 and 28. This is one more reason to sustain that the Court was right in not accepting the argument of the Netherlands government that Dutch legislation did not discriminate on the grounds of nationality, and only issued a differential treatment on the basis of the restricted or unrestricted period of residence allowed by the residence permit. See also the Advocate General Lenz's opinion on the case, who suggests that the relevant Dutch Law could, in itself, be considered by the national court as applicable to the case of Mrs. Reed. However, he sustained that the reference made in Article 7(2) of Regulation 1612/68 to the enjoyment of the same social advantages "as national workers" could apply only to the delimitation of the rights of workers entitled to be admitted, but not to the delimitation of the category of persons entitled to be admitted with the worker. The Court did not follow him in its decision on the case. See case 59/85, Reed, quoted supra, at p.1292.

[350] Presently prohibited by Article 6 of the EC Treaty, after its renumbering by the Treaty on European Union.

[351] See her arguments as recalled by the Advocate General Lenz, idem, at p.1293. Note also that the quoted supra Article 10 (2) of Regulation 1612/68 establishes that Member States shall "facilitate the admission of any member of the family" not included in paragraph 1 of the same document. This could be construed to include a partner of a worker, when both live together in a marital-like status.

> the regulation, it must be held that the term spouse in Article 10 of the Regulation refers to a marital relationship only."[352]

Then the Court referred to Article 7(2) of the same Regulation, which provides that in the host State a worker who is a national of another member State must "enjoy the same social and tax advantages of nationals." If Reed's partner had been Dutch, she could have obtained a residence permit. The Court considered this to be a social advantage within the meaning of that provision, as it "can assist [the foreign worker's] integration in the host State and thus contribute to the achievement of the freedom of movement of workers."[353]

However, maybe one could perhaps go a bit further. Another sense of equality in the context of free movement of persons should be considered. It should not only be assessed whether there is a discriminatory treatment against the migrant worker (national of a Member State) compared to nationals of his or her host country. We should also examine his or her situation in relation to the position he had in his or her country of origin, or to the position of his or her compatriots who move within their country of origin.[354] In this respect, he or she is discriminated against in relation to that position, in particular if his or her country of origin gives his or her partner the right to residence based on their relationship.

One possible solution could be to give the third country national partner of a migrant worker, who is a national of a Member State, the right of residence in the new host EC country, provided he or she had such a right in the worker's country of origin. The European Parliament, in its opinion on the proposal of the Commission to amend Regulation 1612/68, proposed a broader rule than the current one, also adding the ruling of the Court in the Reed case. A new paragraph 2 of Article 10 of the Regulation would extend the right to residence in the new country to:

> "(...) the person with whom the worker lives in a de facto union recognised as such for administrative and legal purposes, whether in the Member State of origin or the host Member State, and their dependent offspring."[355]

This official recognition could make an important contribution to protect rights of the concerned persons, while avoiding that liberal EC rules became a tool to easily circumvent migration laws. However, this proposal was not adopted by the Council.[356]

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[352] Case 59/85, paragraph 15.

[353] Idem, paragraph 28. Note that, as recalled by Advocate General Lenz, Mrs. Reed was already in England when reference to the Court of Justice was made, although her deportation order had been suspended. Mrs. Reed and her companion had gone back to the United Kingdom and had no intention to return to the Netherlands.

[354] This is mentioned by the Court in the Surinder Singh case, when determining whether or not the result of the application of British Law would be that a "national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State." See the Surinder Singh case, quoted supra, paragraph 19.

[355] Amendment 67 proposed by the resolution adopted by the European Parliament on 14 February 1990, OJ C 68/87 of 19/3/1990. As recalled supra, the European Parliament proposed to extend the Commission draft amendment, according to which the dissolution of marriage of the worker would not affect the right of the worker's ex-spouse to reside and work in the territory of the host Member State, to "the de facto separation of the couple". Resolution adopted by the European Parliament on 14 February 1990, OJ C 68/87 of 19/3/1990, amendments Nos. 11 and 64, and 68. See also Commission Proposal for a regulation amending Council Regulation 1612/68, COM (88) 815 final, SYN 185, OJ C 100/6 of 21/4/1989.

(ii) E.C.H.R. perspective

The Commission and Court of Human Rights have consistently held that family life is protected by Article 8 whether or not it results from a marriage. The important factor is that family life really exists.[357] This means, for instance, that a child born out of wedlock is entitled to as much protection as the child born within marriage. Moreover, the Commission of Human Rights of Strasbourg has already recognised that extra-marital relationships of a couple may also constitute family life within the meaning of Article 8.[358]

From a legal point of view, it may be more difficult to prove the existence of the family life of an unmarried couple than that of a married one. However, the criteria usually applied to establish the existence of family life[359] can also be expected to apply to informal families.[360] Here it will be assumed that the existence of family life has been proved.

Therefore in this context there are two issues that remain to be analysed as far as the treatment of informal families is concerned. The first issue specifically concerns the E.C.H.R.: would the Commission and Court of Human Rights apply to informal families their case-law on Article 8 in a migration context? The second issue concerns the immigration rules under the Community instruments dealing with the free movement of persons. When they differentiate between married and unmarried couples, is this discrimination contrary to Article 14 of the E.C.H.R.?

1. The answer to the first question seems more straightforward than that of the second. The Commission and Court of Human Rights have on a number of occasions protected relationships outside marriage, even if usually with regard to relationships between parents and their children.[361] On the relationship between the two members of

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[356] A similar proposal was presented by the Parliament, on 13 December 1989, on the three new Directives of 1990 on the right to residence, OJ C15, p.70, 74 and 78. It was also unsuccessful.

[357] For the Commission and the Court of Human Rights of Strasbourg it is not enough to demonstrate that there is *de iure* family life. This has been considered as a limit to the relevance, under the Article 8, of relations outside the nuclear family (that of a couple and their children).

[358] Applications No.7289/75 and No.7349/76, X and Y v. Switzerland, Yearbook E.C.H.R., Vol.20, 1977, p.372, at 408. There, it is stated that the "Commission does not deny that extra-marital relationships may constitute 'family life' within the meaning of [Article 8 of the Convention]. In the present case, however, there is no common household of the applicants and they do not permanently live together, the first applicant being married and normally staying with his family [elsewhere]."

[359] Namely the sentimental and economic ties, besides the biological ties between parents and their children. See section B of chapter 1.

[360] I will use this expression to define the (family) relationship in a couple who is not married, but live together, or have a stable relationship in the way married couples have. The "informal family" includes, of course, the children of such a couple. The lack of attention paid to them is due to the fact that it is usually easier to recognise, before the law, the relationship between those children and their parents (considered individually) than between the parents themselves .

[361] See the judgment of the Court of Human Rights of Strasbourg in case Marckx v. Belgium, Series A, No.31, 1979, paragraph 31 (on the mother); the one of the case Rasmussen v. Denmark, Series A, No.87, 1985 (on the father) and in case Johnston v. Ireland, Series A, No.112, 1987 (as far as both parents are concerned, but particularly on the position of the father). See also the judgment of the Keegan case, on the rights of the biological father not living with the mother, Keegan v. Ireland, judgment of 26/5/1994, series A, Vol.290. Likewise, see the decision of the Commission of Human Rights of Strasbourg on the admissibility of Application No.20769/92, G.F. v. Germany, D&R, No.78-A, p.111, in which is declared

the couple themselves, apart from one decision of the Commission,[362] there is no other case-law in a migration context. However, both the Commission and the Court have repeatedly held that family life has to be protected independently of the existence of a marriage.

This idea was implicitly taken up again in the statements of the Court and of the Commission in the Johnston case.[363] In this case, a couple composed of a married man (separated from his wife) and a (single) woman, lived together with their common child. They claimed that their status under Irish law, which did not give them the same benefits as married couples, violated Article 8 of the E.C.H.R. Despite denying violation of that provision, the Commission and Court of Human Rights accepted that family life could exist between them. The Commission was satisfied that: "there exists no legal impediment under Irish law preventing the applicants from living together [and] supporting each other".[364] On this point, the Court declared that it was important that :

> "Ireland has done nothing to impede or prevent them from living together and continuing to do so and, indeed, they have been able to regularise their situation as best they could".

However disputable the conclusion reached in this case may be, it nevertheless remains that both the Commission and the Court of Human Rights recognised implicitly the importance of non interference with the life of informal families. More recently, in the Kroon case, the European Court of Human Rights declared that:

> "as a rule, living together may be a requirement for 'family life', but exceptionally other factors may also serve to demonstrate that a relationship had sufficient constancy to create de facto 'family ties' - such is the case here, as four children have been born to Mrs.Kroon and Zerrock".[365]

Hence, it may be assumed that the relationship of an unmarried couple, living together as a family, could be protected under the E.C.H.R., by the Commission and Court of Human Rights.

2. As far as the second question is concerned, it might be recalled that Article 14 of the E.C.H.R. provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Community rules provide that a married national of a Member State may take his or her spouse with him or her when moving to another Member State. A non-married person, however, in a family relationship with a partner, may not take the latter with him. Do these EC rules conform to Article 14 of the E.C.H.R.?

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that Article 8 makes no distinction between "legitimate" and "illegitimate" family. See also case Kroon v. the Netherlands, judgment of 27 October 1994, series A, No.297-C.

362 This, in the end, considered that the relationship in question did not constitute family life. See Applications No.7289/75 and No.7349/76, quoted supra.

363 Johnston v. Ireland, quoted supra.

364 Idem, paragraph 116 of the Commission's decision.

365 See case Kroon, quoted supra.

According to the case-law of the Commission and Court of Human Rights,[366] to assess the existence of inadmissible discrimination in a certain case, 4 elements have to be found: (1) a differential treatment, (2) of analogous situations,[367] (3) with no objective not reasonable justification for that difference (with regard to the aim and effects of the measures concerned), and (4) no reasonable proportion between the means employed and the aim sought to be realised. Each element will be examined separately.

1) Clearly Community rules with regard to freedom of movement treat spouses and partners of Community nationals differently. The practical result established by the Court of Justice in the Reed case is an exception to the functioning of EC rules on free movement of persons.

2) However, are the situations of these persons analogous? Are the important elements of their situations similar enough to consider them analogous?

Two aspects must be considered. One is that both kinds of couples, married and unmarried, have family life relevant for the purposes of Article 8 of the E.C.H.R..[368] In this respect they are in a similar situation.

The other point is that the married couple has an official relationship, instituted by a formal act and with precise legal consequences. The unmarried couple may or may not be recognised by law and thus may or may not have precise rights and duties. This depends on the law of their country of residence.[369] In some countries, however, the unmarried couple is in this respect in a fairly similar position to the married one.

Meanwhile, it would seem that the situation of an unmarried couple, living in a relationship of a marital kind, is essentially analogous to that of a married couple, assuming that the essential point is the relationship of the two persons with each other, not before the law. Provided that the existence of such a relationship is proved, there seems to be no reason not to protect it as family life. This is even more evident if they have common children, or if the law of their Member State of origin[370] recognises the existence of their relationship for identical purposes of those of a married couple.

In any event, the Johnston case may be considered. In that case, it was stated that: "the Court does not consider possible to derive from Article 8 an obligation [of the Government] to establish for unmarried couples a status analogous to that of married couples". The point is that what is asked for here is not a general status of equality with the married couples. I am only claiming that even if a couple is not married, that couple

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366 Velu, J. & Ergec, R., *La Convention Européenne des Droits de L'Homme*, Brussels, Bruylant, 1990, p.117. Here the issue will be analysed with the method used by the Commission and the Court of Human Rights of Strasbourg, although the scrutiny of Community rules would be made by the Court of Justice of the European Communities. On the principle of non-discrimination in Community Law see Schermers & Waelbroeck, op.cit., p.69.

367 As it is pointed out by van Dijk & van Hoof, op.cit., p. 540, in most cases, unfortunately, the Commission and the Court of Human Rights of Strasbourg give less or no relevance at all to the examination of comparability between the various situations at stake, concentrating instead on the analysis of the government's justification.

368 Again, I assumed this was proved in relation to the unmarried couples.

369 Or, to be more precise, the law regulating their relationship - according to the rules of Private International Law.

370 I.e., where they previously resided.

should not be prevented (in any circumstances whatsoever) from continuing to live together if they decide to move to another Member State. It is the very existence of the family life of the couple that is in question, not the way in which they may organise a negligible part of their lives.

3) Next, it has to be discovered whether or not the justification for the different treatment of the two kinds of couples is objective and reasonable. Here, the issue in question is not whether the rules under examination are discriminatory, but whether that discrimination achieves "a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention".[371]

One argument against equality in this context could be the danger of affecting the classical model of the family, resulting from an official marriage, which may be seen as a sustainable interest of the society. However, it is unlikely that this would receive much consideration from the Court. The most likely argument to be considered by the Court could relate to the possibility of fraud control in immigration. It could be sustained that if unmarried couples were given the same immigration rights as married ones, a danger would exist of fake couples invoking their status as family to circumvent migration laws. However, this argument may not be sufficiently objective and reasonable to justify the Community rules as they stand. To avoid such a fraud, the control of the existence of the family life of unmarried couples could be made in a similar way to that of the married ones,[372] or, if duly justified, even in a stringent manner.

In any case, it seems clear that some possibility should be given for the persons concerned to prove that they really are engaged in a relationship where family life exists. Otherwise, it could not be said that, with regard to the effects of the measures concerned, there was an objective and reasonable justification for the differential treatment in question. Neither could it be said that a fair balance between the protection of the interests of the community and the respect for the rights of the individual is achieved.

4) In any case, even if the justification was considered to be objective and reasonable, it seems clear that the means employed are completely disproportional with the aim pursued. On one hand, (in the prevention of fraud hypothesis) there is the mere possibility that two persons agree to get married in order for one of them to acquire the right of residence in a Member State, while for all practical purposes they are not really married. On the other hand, the unmarried couple, under Community Law has no chance whatsoever of acquiring the right to reside together in a new Member State, even if, for example, they prove beyond doubt that they have been living together for years and have several children. It seems clear that here there is not a reasonable proportion between the means employed and the aim to be realised.

To the extent that this assessment is true, the Community Law rules on the matter do not conform to the standards of the E.C.H.R.

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371 "Belgian Linguistic" case, judgment of 23 July 1968, Series A, No.6, 1968, p.44. For criticism of this reasoning as a way of procedure, see van Dijk & van Hoof, op.cit., pp.542-3.

372 Such a control is often very stringent, as demonstrates, i.e. the "primary purpose" rule in British Immigration Law and the attempts by the French authorities to strictly control the existence of real family life in immigration cases.

C - THE RIGHTS OF THIRD COUNTRY NATIONALS IN OTHER AREAS OF EC LAW - A USEFUL COMPARISON ?

Conventional wisdom says that the Community does not have competence to act with regard to third country nationals, except in a few cases regarding relatives of nationals of a Member State who are migrants in another Member State and in situations envisaged in external agreements.

This supposed lack of Community competence was already questioned in chapters 2 and 3. However, the worst aspect of this superficial idea - that the Community can only exceptionally act with regard to third country nationals - is that this is often confused with the idea that Community Law in general does not apply to third country nationals. The objective of this section is to assess whether and to what extent certain areas of Community legislation include third country nationals in their personal scope [hereinafter: have a general or narrow personal scope, respectively].

It is not the purpose of this section to make a comprehensive inquiry into the personal scope of Community Law, as a whole. First, the legislation relating to free movement within the Community has already been dealt with in sections A and B. Secondly, it is rather obvious that most of the economic law of the Community applies to nationals of a Member State and to third country nationals alike, the latter being either natural or legal persons. Provided third country nationals have the right to operate in or with the Union, they are, in principle, within the personal scope of Community Law regarding, e.g., commercial policy, competition policy, industrial policy, taxation and undertakings. However, for the purposes of this thesis what is important is the situation of natural persons living in the Union and who are nationals of a third country. Therefore, the analysis of this section will concentrate on some areas of special relevance for such natural persons. This section will not deal with areas the main relevance of which is for legal persons, notably for enterprises from third countries.

Two areas in particular will be examined in this section: social policy and education. Community social policy seems to be of particular importance for the everyday life of nationals of third countries living in the Union. This is due to the fact that, in one way or another, a considerable proportion of EC social policy measures relate to the protection of persons with an inferior socio-economic status, which is usually the one held by third country nationals. In the meantime, the importance of education also lies in the strategical relevance that it has for the personal and collective integration of third country nationals in the Member States. Finally, this section will make a short reference to other rules of Community Law applicable to third country nationals, as far as procedural rights and also officials of the European Union institutions are concerned.

The analysis in this section is meant to contribute to determining whether the application to third country nationals of EC legal instruments is the rule or the exception within Community Law. In the end some conclusions will be submitted.

1- SOCIAL POLICY, BESIDES FREE MOVEMENT OF PERSONS

a) Treaty Provisions

Except as far as the free movement of persons is concerned, the social provisions of the EC Treaty[373] seem to be drafted in such a manner as to have a clear general personal scope - i.e. to include third country nationals in their personal scope. Those provisions usually refer to "workers",[374]"labour",[375] and "men and women"[376] in such a generic way that it is legitimate to presume that they refer to all workers, regardless of their nationality.

Chapter 2 of this dissertation has already examined the possibility of using the EC Treaty provisions on social policy as a legal basis for the pursuit of Community activities in relation to third country nationals, including the enactment of legal measures concerning them. That chapter analysed, for instance, the case of Article 118, which establishes that the Commission shall promote close cooperation between Member States in the social field. In the Germany et al. v. Commission cases,[377] the Court ruled that Article 118 authorised the Commission to promote consultation on policy on immigration and immigrants from third countries, except as far as the cultural integration of such workers was concerned.

Within the social provisions of the EC Treaty, only Article 121 seems to potentially exclude third country nationals. It regards the assignment by the Council to the Commission of "tasks in connection with the implementation of common measures, particularly as regards social security for migrant workers referred to in Articles 48 and 51". This last reference relates mainly to nationals of Member States, because, as mentioned in section A of this chapter, only such nationals are considered to have an independent right to freedom of movement as workers.

In all other respects, the social provisions of the EC Treaty seem to apply to all workers in the European Union, irrespective of nationality.

As regards the Treaty of the European Coal and Steel Community and that of the European Atomic Energy Community they establish clearly that free movement of workers in their domain is reserved to nationals of Member States.[378] However, other provisions of the same treaties also make general reference to "workers" - for instance as far as wages or health and safety are concerned.[379] As pointed out above, this contrasts with Article 48 of the EC Treaty, which mentions "workers" and "workers of the Member

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373 Chapter 1 and 2 (on Social Provisions and The European Social Fund, respectively) of Title VIII (on "Social Policy, education, vocational training and youth") of the EC Treaty, as amended by the Treaty on European Union, correspondent to Chapter 1 and 2 of Title III of the EEC Treaty (on Social Policy) of the version of the Treaty of Rome in force before the Treaty on European Union.

374 Articles 117, 118, 118A and 123 (on the European Social Fund).

375 Article 118B, on "dialogue between management and labour at European level".

376 Article 119, on "the principle that men and women should receive equal pay for equal work".

377 Joined cases 281, 283-285, 287/85 Germany v. Commission [1987] ECR 3203.

378 Article 69(1) and Article 96, respectively.

379 See Articles 46, 48, 56, 68 and Article 69(4) of the ECSC Treaty and Articles 2 and 30, as well as 97, 148 and 196 of the EAEC Treaty.

States". This reference has been interpreted by the Court of Justice in the Meade case,[380] and implemented by secondary Community Law on free movement of workers, as if it would only concerned workers who are nationals of Member States.

b) The Community Charter of Fundamental Social Rights of Workers

The Community Charter of Fundamental Social Rights of Workers was adopted at the European Council of Strasbourg in December 1989.[381] It was approved by all of the then Member States of the European Community, except the United Kingdom. It was meant to reflect their "attachment to a model of social relations based on common traditions and practices" and to "serve them as a reference point for taking fuller account in future of the social dimension in the development of the Community".[382] The Charter has often been referred to in the Preamble of Community instruments on social matters. Thus, it may be relevant to examine whether or not the Charter was intended to cover workers who are nationals of third countries.[383]

First, the title of the Charter refers to "workers", and, as Bercusson recalls, "workers" may "include persons who are not Member States citizens, but are working in the Community."[384] As he adds, the question may even arise "as to whether workers who are not Community nationals may be lawfully resident."[385]

Secondly, in the Preamble of the Charter, a recital states that:

> "(...) the completion of the internal market must offer improvements in the social field for workers of the European Community, especially in terms of freedom of movement, living and working conditions, health and safety at work, social protection, education and training,(...)".

As explained above, freedom of movement of workers is considered to be limited to nationals of a Member State, thus the reference to "workers of the European Community" must relate here to "workers who are nationals of a Member State". This would indicate that the Charter does not apply to third country nationals. This seems to be somewhat confirmed in a later recital stating that:

> "(...) it is for Member States to guarantee that workers from non-member countries and members of their families who are legally resident in a Member State of the European Community are able to enjoy, as regards their living and

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380 Case 238/83, quoted supra.

381 Community Charter of Fundamental Social Rights of Workers, adopted in the European Council of Strasbourg in December 1989, published e.g., in *Social Europe*, No.1, 1990, Commission of the European Communities, Directorate-General for Employment, Industrial Relations and Social Affairs, Brussels, 1990, pp.46-50.

382 Conclusions of the French Presidency, Bull. EC, 12/1989, pg. 11, point 1.1.10.

383 Even beyond the determination of the precise legal value of the Charter. For an analysis of the legal status of the Charter in the Community legal order see Hepple, Bob "The Implementation of the Community Charter of Fundamental Social Rights", *MLR*, Vol.53, 1990, No.5, pp.643-654, at 644-646.

384 Bercusson, Brian "The European Community's Charter of Fundamental Social Charter of Workers", *MLR*, Vol.53, 1990, No. 5, pp.624-642, at 627. Bercusson also highlights the differences between the drafts and the final version of the Social Charter, in that the latter mentions workers and the former refers to citizens, idem, pp. 626-627.

385 Idem.

working conditions, treatment comparable to that enjoyed by workers who are nationals of the Member State."

This recital appears to exclude third country nationals from the personal scope of the Charter, at least as far as Community Law is concerned.[386]

In any case, it is worth noting that this exclusion contrasts with the previous versions of the Social Charter. In the first version proposed by the Commission, the relevant recital made a general declaration, stating:

> "Whereas workers from third countries who are legally resident in a member state of the Community should benefit from treatment comparable to that of workers of the member state concerned."[387]

The second Commission proposal makes a slight change, stating that:

> "Whereas workers from non-member countries who are legally resident in a member state of the Community should be able to enjoy treatment comparable to that enjoyed by workers who are nationals of the member state concerned."[388]

The expression "should benefit" from comparable treatment, in the first version, becomes "should be able to enjoy" comparable treatment, in the second version. "Comparable treatment" is already an imprecise and weak expression if it is compared with the expression "equality of treatment" - which we could legitimately expect to find in a document of this type. Yet, the Charter becomes even weaker on its way to the final version, because the latter declares that "it is for Member States to guarantee" such comparable treatment. In this manner, no doubt is left as to the divisions of competence between Member States and the Community, at least as far as the intentions of the drafters of the Charter are concerned.[389]

Nevertheless, a third important element remains to be analysed: the main text of the Social Charter. This text contains words and expressions with a general meaning. On employment and remuneration, for example, the Charter refers to "every individual" or "all employment". It also states that equal treatment "for men and women must be assured". Moreover, it provides for protection or assistance to "all disabled persons", or to "any person who [has] reached retirement age but who is not entitled to a pension" or to "persons who have been unable to enter or re-enter the labour market", or to "young people".

These expressions, in themselves, could also include third country nationals. However, the matter becomes more complicated when the same type of expression seems

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386 Although, arguably, the principle of comparable treatment could be seen as a principle of Community value to be enforced by the Member States.

387 See the draft of the Commission published in *EIRRev*, No.186, July 1989, pp.27-29.

388 See the draft of the Commission published in *EIRRev*, No.190, November 1989, pp.26-28.

389 That careful wording may be important should there be an eventual judicial use of the Charter. The Court of Justice could be called on to rule on a case in which the equality of treatment between a worker national of a Member State, on the one hand, and someone who is a national from a third country, on the other, is at stake. The careful wording of the Charter, declaring it to be for the Member States to guarantee comparable treatment between both types of workers, does not help the Court to draw inspiration from the Charter, or in any other way to use the Charter as a basis to declare discrimination in this context to be incompatible with Community Law. The fact that the Charter was not approved by the United Kingdom does not help either, except, perhaps, in the case that the rules at stake would not apply to the United Kingdom because they were enacted under the Maastricht Social Agreement - annexed to the Protocol on Social Policy to the Treaty on European Union.

to be used with different meanings. For instance, the term "worker of the European Community" is an expression that is repeated in the Charter. Point 1, providing that "Every worker of the European Community shall have the right to the freedom of movement throughout the territory of the Community", seems clearly to indicate that the intention of the European Council was not to extend that right to third country nationals. Again, the expression as used in that context is equivalent to "every worker who is a national of a Member State". However, what about in other cases? Doubts may be raised, for example, when the Charter provides that "every worker of the European Community shall have a right to a weekly rest period and to annual paid leave" or that "the conditions of employment of every worker of the European Community shall be stipulated in laws, a collective agreement or a contract of employment". Would these rules apply only to nationals of a Member State and not to third country nationals? It seems difficult to justify such a restrictive interpretation.

It is submitted that the Community Social Charter was not meant to change in any way whatsoever the legal status quo regarding, first, the competence of the Member States and of the Community vis-à-vis third country nationals and, secondly, the personal scope of Community social legislation. In this manner, the reference made in the recital to the competence the Member States vis-à-vis workers from third countries should be understood as a precaution of the EC governments against any extension of Community competence through the Charter. On the other hand, the Social Charter should not be interpreted as precluding the application of Community Social Law to third country nationals.

In the meantime, the fact that different elements of the Charter seem to point in contradictory directions (by apparently limiting its scope to nationals of a Member State in the Preamble and then often using expressions with a generic sense in the main text) demonstrates, perhaps, how difficult it can be in most cases to exclude third country nationals from the personal scope of Community social legislation. It is therefore necessary to examine that legislation.

c) Secondary legislation

As explained in section A of the present chapter, the Community rules on the free movement of workers (employed or self-employed persons) apply almost exclusively to nationals of Member States. Third country nationals have, at most, only a derived right to follow their relatives who are migrant nationals of a Member State. As regards social security matters related to movement within the European Union, the rights of third country nationals are also very limited. Therefore, following such basic guidelines, the personal scope of all EC social legislation relating to freedom of movement of workers is usually restricted to nationals of the Member States.[390]

However, this appears to be in contrast to the rest of Community social legislation, which seems to have a general personal scope (it is also applicable to third country nationals), or, at least, its personal scope is not explicitly limited to nationals of Member States. For the purposes of this section, EC Social legislation (not related to free

[390] Note also the Communication from the Commission on living and working conditions of residents in frontier regions (specially frontier workers) which, in its own title, declares that is only concerned with "Community citizens", COM (90) 561 final, of 27/11/1990.

movement of workers) will be roughly divided into five groups, according to their subject matter. These groups include legislation related, first to workers in general and their rights in particular; secondly to health and safety at work; thirdly to specific groups of persons, fourthly to the European Social Fund and the fifthly to some other remaining matters.

(i) Rights of workers

The social legislation relating to the position and rights of workers[391] does not differentiate between workers who are and who are not nationals of a Member State. Sometimes, EC legislation appears to indicate clearly that it also applies to third country nationals when it uses expressions such as "every paid employee".[392] However, the legal expressions or concepts most used by EC social legislation (on workers and their rights) are of a less precise character. Often such legislation uses quite generic expressions such as "workers" (or "individual workers"[393], or "shift worker"[394]) and "employees"[395] (or "employed persons"[396]) or "employer",[397] with no further delimitation - at least as far as their nationality is concerned.[398]

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391 Workers as such and not as nationals entitled to rights of free movement within the Community.

392 Article 1 of the Council Directive 91/533 of 14/10/1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 228/32 of 18/10/91.

393 Article 1(1)(a) of the Council Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies, OJ L 48/29 of 22/2/75.

394 Council Directive 93/104/EC, of 23 November 1993 concerning certain aspects of the organisation of working time, OJ L 307/18 of 13/12/93.

395 See Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61/26 of 05/03/77; and Council Directive 80/987/EEC of 20/10/1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 283/23 of 28/10/80. Article 1 of the latter Directive applies to "employees claims arising from contracts of employment or employment relationships and existing against employers" in a state of insolvency. The Directive establishes that "Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this Directive, by virtue of the special type of the employee's contract of employment or employment relationship or of the existence of other forms of guarantee offering the employee protection equivalent to that resulting from this Directive" - Article 1(2). Such categories are listed in the annex to the Directive and do not refer to a nationality criterion. See also the Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288/32 of 18/10/91; the Council Directive 93/104/EC on working time, quoted supra; and the Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254/64, of 30/09/94. As mentioned supra in section A, it may be argued that this Directive constitutes a basis to hold that a third country national, who is a representative in a European Works Council, has a Community right to travel to another Member State when that Works Council meets there.

396 See the Council Recommendation 92/443/EEC of 27 July 1992 concerning the promotion of participation by employed persons in profits and enterprises results (including equity participation), OJ L 245/53 of 26/8/92. This expression was also used by the Commission's proposal for a Council Directive on certain employment relationships with regard to working conditions, and by the Commission's proposal for a Council Directive on certain employment relationships with regard to distortions of competition - both contained in COM (90) 228 final of 13/8/1990. However, these two proposals are to be withdrawn by

As far as the wording of the provisions is concerned, it may certainly be pointed out that in the Mikkelsen case[399] the Court of Justice considered that the meaning of the term "employee" to be protected by Directive No.77/187[400] was equivalent to that of the persons protected as employees under national employment law. In this manner, the Court referred to national law to define the precise meaning of a Community rule. Nevertheless, this does not seem to raise problems for the analysis engaged in this section, even if the concepts used by Community Law were to be defined exclusively according to national laws. Usually, national labour laws do not discriminate between workers who are nationals of a Member State and those who are not - at least not in the matters covered by the EC Law in question.

Besides the mere wording of the provisions, or the context in which they are used does not indicate that they are meant to have a narrow personal scope - i.e. to cover nationals of a Member State only. On the contrary, the wording, as well as the context of the provisions, seem to indicate that the legislation applies to nationals of Member States and third country nationals alike.

This derives, inter alia, from the fact that EC legislation in this area pursues a general objective of workers protection. This objective could not be truly achieved if it excluded nationals of third countries who are workers in the European Union. Furthermore, another clear objective of the EC legislator in the adoption of these instruments was to make an approximation of national labour legislation. Again, it could be said that there is a common tradition of national labour laws, in the matters covered by the discussed EC Law, according to which they usually apply without discrimination to national and foreigner workers alike.[401] Thus, it would be impossible to achieve a real harmonisation of national rules if the relevant EC Law excluded third country nationals from its personal scope.

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the Commission according to the Medium Term Social Action Programme 1995-1997, COM (95) 134 final, of 12/4/1995, p.36.

397 Regulation (EEC) No 3821/85 on recording equipment in road transport, OJ L 370/8 of 31/12/85.

398 See also the case of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport, OJ L 370/1 of 31/12/85, which Article 1(3) establishes that for the purposes of the Directive " 'driver' means any person who drives the vehicle...". Regulation (EEC) No 3821/85 on recording equipment in road transport (OJ L 370/8 of 31/12/85), which establishes that for its purposes the same definitions of Regulation 3820 is applied. Regulation 3821/85 refers also to "employer" and "driver", in generic terms.

399 See case 105/84, quoted supra, paragraphs 26-8.

400 Quoted supra, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

401 National legislation on social security often differentiates between workers (and their relatives) who are nationals of a Member State and those who are not. However, if we exclude EC legislation on social security for beneficiaries of free movement and that on non-discrimination on the basis of sex, we have to conclude that binding EC instruments on social security are rather perfunctory or even non existent.

(ii) Health and Safety at work (or closely related to workers)

Here it is seems to be particularly clear that there is no substantive reason to exclude workers who are third country nationals from the personal scope of EC measures. Furthermore there seem to be important reasons to include them. This conclusion may be drawn in light of the wording, the context, and the objective foreseen by the relevant EC legislation in this area.

As far as the wording is concerned, in none of the legal instruments is there an explicit or implicit distinction between workers who are nationals of a Member State and workers who are not. Whenever there is a mention of "workers", it is a general one.[402] Sometimes expressions of a less undetermined character are used. The Directive on medical treatment on board vessels, for example, defines the worker to whom it applies as being "any person carrying out an occupation on board of a vessel".[403] Some other Directives refer only to any natural or (sometimes) legal person who carries out a certain activity or has a certain responsibility - again with no distinction based on nationality.[404] In all cases it seems that the Directives include third country nationals in their personal scope.

As far as the context of the provisions on health and safety is concerned, there seems to be no reason to conclude that they apply to nationals of a Member State only.

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[402] See, e.g., the Commission Recommendation of 22 May 1990 to the Member States concerning the adoption of a European schedule of occupational diseases OJ L 160/39, 26/6/1990; Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ L 206/19 of 29/07/91; Council Directive of 25 June 1991 amending Directive 83/477/ EEC on the protection of workers from the risks related to exposure to asbestos at work, OJ L 206/16 of 29/7/91; Council Directive on minimum requirements for the provision of safety and/or health signs at work, OJ L 245/23 of 26/8/92; and Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at mobile constructions sites, OJ L 245/6 of 26/8/92. The Directives referred to often detail the duties that each Member State is expected to impose on the employers. These duties include actions related to the working place and material or to the workers - even if the latter appear some times under other words, like "persons". See also, e.g., Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breast feeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391 /EEC), OJ L 348/1 of 28/11/92; and Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling (eleventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 348/9 of 28/11/92. Note, finally, that Articles 3, 4 and 5 of Council Directive 93/104, quoted supra, refer to "every worker". This Directive was adopted under Article 118A of the EC Treaty - on improvement of health and safety of workers, especially in the working environment.

[403] Article 1(b) of Council Directive 92/29/EEC on the minimum safety and health requirements for improved medical treatment on board vessels, OJ L 113/19 of 30/4/92. Moreover, for the purposes of the Directive, the vessels to be covered are all vessels flying the flag of a Member State or registered under its jurisdiction. Thus any worker in such vessel is protected by the Directive.

[404] Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 245/6 of 26/8/92; Council Directive 92/58/EEC of 24 June 1992 on the minimum requirements for the provision of safety and/or health signs at work (ninth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 245/23 of 26/08/92.

Furthermore, the very objective of EC legislation on health and safety at work is an important reason to consider that such legislation also applies to third country nationals. In most of the cases it is fairly obvious that the very aim of the initiatives cannot be attained if distinction is made between workers, based on their nationality, or on any other criterion not related to the conditions regarding health and safety. Usually, ensuring certain conditions of health and safety requires the effort of every person involved. It could be pointless, for instance, to require a French worker to take some action or care to protect health and safety, if his or her Algerian colleague is allowed to pay no attention to it and puts the former (and himself) in danger.

Furthermore, the objectives of the legislation on safety and health at work are as much in the interest of the workers themselves,[405] as they are in the interests of society as a whole. It is in the interest of society, for instance, to reduce medical expenses and social security allowances caused by accidents at work. This interest could not be fully achieved if third country nationals were excluded from the personal scope of the Directives and were thus exposed to risks to their health.

A further argument to sustain a general personal scope for the legislation in question is the fact that it has its legal basis in Article 118a(1) of the EC Treaty. This article states that:

> "Member States shall have particular attention to encouraging improvements, especially in the working environment, as regards health and safety of workers".[406]

Such a generic reference seems to confirm the idea that in this area Community instruments apply to workers who are nationals of third countries.

(iii) Action on specific groups of persons, besides workers

An important group of Community social instruments relates to action on specific groups of persons, besides workers. They share with most EC social legislation the characteristic of having a general undetermined personal scope. That is the case of instruments making generic reference to "disabled people",[407] "elderly",[408] "young people",[409] "men and women",[410] or "poor people".[411]

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405 Or of directly concerned persons, like employers, clients and other persons directly and individually affected by safety and health conditions.

406 Emphasis added. See also Article 118a(3), making a generic mention to "the protection of working conditions".

407 See, e.g., the Council Decision 93/136/EEC of 25 February 1993 establishing a third Community action programme to assist disabled people (Helios II 1993 to 1996), OJ L 56/30 of 09/03/93. Its Article 1 defines it as an action programme to promote equality of opportunities for and the integration of disabled people and Article 2 defines disabled people without making any reference to a nationality criterion. Note, finally, that Article 2 of the Commission Proposal for a Council Directive on minimum requirements to improve the mobility and the safe transport to work of workers with reduced mobility ("with motor disabilities"), defines the latter workers as "any worker who has special difficulty in using public transport", OJ C 68/7 of 16/3/91, as modified (OJ C 15/18 of 21/1/92).

408 See, e.g., the Council Decision 91/49/EEC of 26 November 1990 on Community actions for the elderly, OJ L 28/29 of 2/2/91; and the Proposal for a Council decision on Community support for actions in favour of older people, COM (95) 53 of 1/3/95.

409 Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, OJ L 216/12 of 20/8/94. According to the Directive, Member States shall take the "necessary measures to prohibit work by children" and that work by young people is performed under conditions suitable to their age, e.g. that

In the light of the lack of other relevant elements of legal interpretation indicating that third country nationals are excluded from their personal scope, it is submitted that such persons are covered by these types of EC legal instruments. It would be inconsistent, for example, to promote the equality of opportunities for men and women, or, even more so, the social integration of marginal groups of persons, but to exclude third country nationals from the scope of the relevant Community measures. Such differential treatment could also amount to a violation of the principle of equality, which is part, inter alia, of Public International Law.

(iv) The European Social Fund

The European Social Fund was established by Article 123 of the EEC Treaty,

> "In order to improve employment opportunities for workers in the common market and to contribute thereby to raising the standard of living(...)."

The task of the Fund is said to be that of

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the work does not harm their health. The very purpose of this Directive indicates that it has to apply also to third country nationals. Article 2 thereof refers to "any person under 18 years of age having an employment contract or relationship". Article 3 defines "young person" as being "any person under 18 years of age", "child" as "any young person of less than 15 years of age", and "adolescent" as "any young person of at least 15 years of age but less than 18 years". Arguably the Directive applies also to illegal workers. Note that this Directive was adopted under Article 118A.

410 See, e.g., Council Directive 75/117/EEC on the approximation of laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 39/40, of 14/8/86; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39/40 of 14/2/1976; Council Directive 79/7/EEC, of 19 December 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6/24 of 10/1/79; Council Directive 86/378/EEC of 24 July 1986 on equal treatment for men and women in occupational social security schemes, OJ L 225/40 of 12/8/86; and the Council resolution of 29 May on the protection of the dignity of women and men at work, OJ C 157/3 of 27/6/90.

411 Council Decision 85/8/EEC of 19 December 1984 on specific Community action to combat poverty, OJ L 2/24 of 3/1/85. Article 1(2) thereof establishes that poor shall mean "persons, families and groups of persons whose resources (material, cultural and social) are so limited as to exclude them from the minimum acceptable way of life in the Member States where they live". This undoubtedly includes third country nationals, who, actually, are one of the most important groups to be dealt with in this initiative. Later the Council adopted Regulation (EEC) No 3730/87 of 10 December 1987 laying down the general rules for the supply of food from intervention stocks to designated organisations for distribution to the most deprived persons in the Community, OJ L 352/1 of 15/12/87. The Preamble of this Regulation speaks of most deprived persons and most deprived citizens, but in its actual provisions the Regulation mentions only most deprived persons. See also the Resolution of the Council and of the ministers for social affairs meeting within the Council of 29 September 1989 on combating social exclusion, OJ C 277/1 of 31/10/89. It refers to "economically and socially disadvantageous groups of people". It is noteworthy that in this Resolution the Council requests Member States to take measures "to enable everyone to have access to education, training employment housing community services and medical care". Finally there are also Commission Regulation (EEC) No 3149/92 of 29 October 1992 laying down detailed rules for the supply of food from intervention stocks for the benefit of the most deprived persons in the Community, OJ L 313/50 of 30/10/92; and the Commission Decision 94/617/EC of 8 September 1994 adopting the plan allocating to the Member States resources to be charged to the 1995 budget year for the supply of food from intervention stocks for the benefit of the most deprived persons in the Community, OJ L 245/23 of 20/9/94. These two latter instruments make no exclusion of their personal scope based on a nationality criterion. See, finally, the draft decision of the Council on a medium-term action programme to combat exclusion and promote solidarity, COM (93) 435 of 22/9/93.

"rendering the employment of workers easier and of increasing their geographical and occupational mobility within the Community, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining."[412]

The generic references of Article 123 have allowed the European Social Fund to finance programmes promoting the integration of nationals from third countries and also the training of social workers and teachers involved with third country nationals residing in the Union.[413]

However, it may be interesting to note that while specific legislation provides for the use of the European Social Fund for certain other groups of persons,[414] there is no legal instrument regarding the specific use of the Fund for third country nationals.

(v) Other instruments

Community measures in some other areas also seem to have a general personal scope. In some cases this is rather clear, although the instruments in question do not have

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412 Emphasis added. This is the original text of the EEC Treaty. Article G (34) of the Treaty on European Union made minor changes to the drafting of this article, including the change of the reference to the "workers in the common market" to "workers in the internal market". This does not challenge, and perhaps even reinforces the assessment that third country nationals workers in Member States may benefit from the Fund actions.

413 See Jacobs, A. T. J. M. & Zeijen, H. in *European Labour Law and Social Policy*, Tilburg, Tilburg University Press, 1993, at p.44; and the reference to this topic in chapter 2. See also, inter alia, Article 1 of Council Regulation (EEC) No.2950/83 of 17 October 1983, on the implementation of Decision 83/516/EEC on the tasks of the European Social Fund, OJ L 289/1, of 22/10/1983; and the very Council Decision 83/516/EEC on the tasks of the European Social Fund, OJ L 289/38 of 22/10/1983. Article 4(2)(d) of this decision states that fund assistance may be granted to promote employment to persons, over the age of 25, who are "migrant workers or have moved within the Community or become residents in the Community to take up work, together with the members of their families". An annex to the decision contains statements to be entered in the minutes. One of such statements relates to Article 4 and goes as follows: "[n]oting that the number of nationals of third countries benefiting from the Fund's assistance is relatively small, the Commission points out that countries receiving migrant workers should make a significant effort to integrate them". Note also the old Council Decision 74/327, of 27 June 1974, on action by the European Social Fund for migrant workers, OJ L 185/20, of 9/7/74. This decision, although not expressly mentioning third country nationals was worded in such a way as not to exclude them. This was particularly clear in its Articles 2 and 3, which defined the activities eligible to receive assistance from the Fund. In its Article 1, the Decision referred only to persons moving "from one Community country to another". These referred to nationals of Member States and their families, since only these were seen as having a right to free movement in the Community. However, Article 2 included under the activities to be funded those "intended to facilitate the reception and integration into their social and working environment of persons, other than frontier workers, who have left their country of origin to take up employment in a Community country, and of members of their families". Moreover, Article 3 allowed for funding of "operations to facilitate the basic and advanced training of welfare workers and teachers responsible for integration courses for migrant workers or their children".

414 See the Council Resolution of 22 June 1994 on the promotion of equal opportunities for men and women through action by the European Structural Funds, OJ C 231/1 of 20/08/94. For other specific groups of persons, see, e.g., Council Regulation (EEC) No 3039/78 of 18 December 1978 on the creation of two new types of aid for young people from the European Social Fund, OJ L 361/3 of 23/12/78; and the Resolution of the Council and of the Ministers responsible for Cultural Affairs, meeting within the Council, of 18 December 1984 on greater recourse to the European Social Fund in respect of cultural workers, OJ C 2/2 of 4/1/85.

a legally binding force. That is the case of a Council resolution of 1992 on the fight against unemployment, which declares that attention should be given to the "breaking down of outdated stereotypes concerning women, disadvantageous groups and older workers".[415] A Council recommendation of June 1992, on common criteria concerning sufficient resources and social assistance in social protection systems,[416] points in the same direction. It suggests that the Member States recognise "the basic right of a person to sufficient resources and social assistance to live in a manner compatible with human dignity". One of the basic principles to be followed in order to recognise that right is that the scope of the latter:

> "be defined *vis-à-vis* individuals, having regard to legal residence and nationality, in accordance with the relevant provisions on residence, with the aim of progressively covering all exclusion situations in that connection as broad as possible".

While this would seem to leave room for restrictions based on nationality, the recommendation declares that "every person" is to have access to that right, provided some criteria of effective need are met. The recommendation further adds that this right is to be "auxiliary in relation to other social rights" and that an "effort should be made in parallel to reintegrate the poorest people into the systems of general rights".[417]

It is also worthy to note a Council recommendation of July 1992 on the general policy principles in the area of social protection.[418] It recommends that "under conditions determined by each Member State", social protection attempts, inter alia:

> "to give any person residing legally, within its territory, regardless of his or her resources, the chance to benefit from the system for the protection of human health existing in the Member State"

Social protection should also:

> "help further the social integration of all persons legally resident within the territory of the Member State."

Furthermore, the Council recommendation states that social benefits should be granted in accordance with principles such as

> "equal treatment in such a way as to avoid any discrimination based on nationality, race, sex, religion, customs or political opinion, provided the applicants fulfil the conditions regarding length of membership and/or residence required to be eligible for benefits".

In addition, the Council recommends that the different forms of social protection should be available to employed (or elderly) persons who are legally resident in a Member State, or to "all women legally resident" (for maternity benefits), or to "disabled persons legally resident" (for incapacity for work).

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415 Council resolution of 21 December 1992 on the need to tackle the serious and deteriorating situation concerning unemployment in the Community, OJ C 49/3 of 19/02/93.

416 Council recommendation 92/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems, OJ L 245/46 of 26/08/92.

417 Note, in any case, that an interestingly prudent recital states that this recommendation "does not affect national and Community provisions on the right of residence".

418 Council recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies, OJ L 245/49 of 26/08/92.

The above mentioned resolutions and recommendations seem to have a clear general personal scope, although they are not legally binding.[419]

2 - EDUCATION, AND VOCATIONAL TRAINING

The EC Treaty provisions dealing specifically with education and vocational training do not exclude third country nationals from their personal scope.[420]

However, EC legislation related to the educational aspects of free movement of persons has a clear narrow scope, i.e., it is not applicable to third country nationals. The legislation on mutual recognition of diplomas (certificates and other evidence of formal qualifications), for example, provides only for the recognition of diplomas awarded to nationals of a Member State.[421] This is the case of the Directives on general recognition of diplomas[422] and on their recognition in specific areas.[423] Furthermore, the Council decisions on the recognition by Member States of diplomas conferred in third countries also have a narrow personal scope.[424] By comparison, the Council Decision on the comparability of vocational training qualifications between Member States[425] has a more general character, at least potentially. It establishes measures related to the uniformity of

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[419] Note, however, that the Court of Justice has recognised the possibility that Commission recommendations have indirect effect. See case C- 322/88, Grimaldi v. Fonds des Maladies Professionels [1989] ECR 4407, mentioned in chapter 3.

[420] See Articles 126 and 127 of the EC Treaty, as amended by the Treaty on European Union.

[421] In any case, note my argument, explained above in this chapter, that in certain circumstances third country nationals residing in the Union should have a Community right to have their diplomas recognised in a Member State.

[422] See Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, OJ L 209/25 of 24/07/92, later amended - OJ L 217/8 of 23/08/94; and Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 19/16 of 24/01/89. Article 2 of both Directives state that they apply to the recognition of diplomas conferred to "any national of a Member State".

[423] Article 2 of Directive 77/452/EEC of 27 June 1977 (nurses responsible for general care), OJ L 176/1 of 15/7/77; Article 3(2) of Council Directive 77/796/EEC of 12 December 1977 (goods haulage operators and road passenger transport operators), OJ L 334/37 of 24/12/77; and Articles 2 of Directive 78/686/EEC of 25 July 1978 (practitioners of dentistry), OJ L 233/1 of 24/08/78; Directive 78/1026/EEC of 18 December 1978 (veterinary medicine), OJ L 362/1 of 23/12/78; Directive 80/154/EEC of 21 January 1980 (midwifery), OJ L 33/1 of 11/2/80; Directive 85/384/EEC of 10 June 1985 (architecture), OJ L 223/15 of 21/8/85; Directive 85/433/EEC of 16 September 1985 (pharmacy), OJ L 253/37 of 24/9/85. Note that this type of Directives often includes "measures to facilitate the effective exercise of the right of establishment and freedom to provide services". This helps to explain that they only apply to nationals of a Member State. However, this, in itself, does not make it impossible to envisage a system of recognition of diplomas conferred to third country nationals. The latter could, for example, benefit from such recognition only insofar as they were under the scope of Community Law on free movement, or as far as national legal orders allowed them to enter, reside and work in a Member State.

[424] See Council recommendation 89/49/EEC of 21 December 1988 concerning nationals of Member States who hold a diploma conferred in a third State, OJ L 19/24 of 24/1/89; Council resolution of 18 June 1992 concerning nationals of Member States who hold a diploma or certificate awarded in a third country, OJ C 187/1 of 24/7/92.

[425] Council Decision 85/368/EEC of 16 July 1985 on the comparability of vocational training qualifications between the Member States of the European Community, OJ L 199/56 of 31/7/85.

descriptions of jobs at a European level to facilitate the circulation of workers in the Union. It makes generic references to "workers" and "skilled workers", although it creates no rights of free movement for third country nationals.

The area of vocational training has further interest in general terms. A part of the Community programmes in the area of vocational training clearly has a general personal scope. The Petra programme, for instance, provides for the possibility of receiving vocational training for "all young people in the Community who so wish".[426] Furthermore, according to the Council decision that established that programme, consideration should be given to the promotion of equal opportunities between sexes and particular attention devoted to "young people most at risk, including disabled and disadvantaged young people".[427] All these references appear to be compatible with the view that third country nationals are included in the personal scope of the programme. Moreover, considering the objective of the programme, to a certain extent the mentioned references only make full sense if that inclusive view is followed. In the meantime, the Council recommendation on access to continuing vocational training, based in Article 128, recommends that Member States "gear their vocational training policies to ensuring that every worker of the Community must be able to have access to continuing vocational training without any form of discrimination".[428] Other instruments in the area of vocational training do not seem to have a narrow personal scope, either.[429]

Another important area is that of special programmes in the area of education. This area is particularly relevant for the application of Community Law to third country nationals. Some programmes use expressions which are generic enough to leave room for their application to third country nationals. The 'Youth for Europe' programme, for example, has the objective of promoting youth exchanges and mobility within the European Union, and states that its measures are directed at "young people".[430] Likewise, the Comett programme does not make nationality-based restrictions on its personal

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[426] Article 1 of Council Decision 87/569/EEC of 1 December 1987 concerning an action programme for the vocational training of young people and their preparation for adult and working life, OJ L 346/31 of 10/12/87.

[427] Article 2(4) of the decision quoted in the previous note, as amended - OJ L 214/69 of 2/8/91.

[428] Point I of Council recommendation 93/404/EEC of 30 June 1993 on access to continuing vocational training, OJ L 181/37 of 23/7/93.

[429] See, e.g., the Commission Recommendation 87/567/EEC of 24 November 1987 on vocational training for women, OJ L 342/35 of 4/12/87, which refers to "young and adult women"; the Council conclusions of 26 May 1987 on vocational training for women, OJ C 178/3 of 7/7/87, which does not use a criterion of nationality to define its beneficiaries; the Council conclusions of 15 June 1987 on the development of continuing vocational training for adult employees in undertakings, OJ C 178/5 of 7/7/87; and the Council Decision 89/657/EEC of 18 December 1989 establishing an action programme to promote innovation in the field of vocational training resulting from technological change in the European Community (Eurotecnet), OJ L 393/29 of 30/12/89. The latter makes no exclusion of natural persons as beneficiaries on the basis of their nationality. Moreover, it is worth noting that Article 4 includes in the aims of the programme the promotion of equality of opportunities for men and women.

[430] Article 3 of Council Decision 91/395/EEC of 29 July 1991 adopting the 'Youth for Europe' programme (second phase), OJ L 217/25 of 6/8/91.

scope.[431] By the same token, a very important programme, Erasmus, refers to university students in generic terms.[432] The Council decision that establishes the programme states in generic terms that

> "Students registered in [university] establishments, regardless of their field of study, are eligible for support within the Erasmus programme(...)".[433]

While one of the aims of the programme is said to be to "strengthen the interaction between citizens in different Member States with a view to consolidating the concept of a People's Europe",[434] the other aims of the programme do not seem to exclude third country nationals, in any manner whatsoever.

A similar situation can be found in the Lingua programme, on the promotion of competence in foreign languages. One of the explicit aims of the programme is related to Member States policies aimed at "encouraging all citizens to acquire a working knowledge of foreign languages". In the meantime, other aims mentioned do not apply only to citizens (of the Member States), but make references of a generic nature, such as the one to "work force".[435] In this respect, it may be recalled here that the Socrates programme states that one of its aims is "to strengthen the spirit of European citizenship",[436] while one of the priority fields of action envisaged by the programme also clearly concerns third country nationals.[437] Thus, the references to Union citizens and citizenship do not exclude, per se, the application of these programmes to third country nationals.

Finally, at least one education programme undoubtedly applies to third country nationals. This is the Community programme on human capital and mobility.[438] The programme provides for scholarships at a post-doctoral level for people referred to as "young researchers", "young scientists", and "researchers". The Council decision that establishes the programme, states that

> "The individual fellowship recipients (...) must be nationals of the Community Member States or natural persons resident in the European Community."[439]

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[431] Council Decision 89/27/EEC of 16 December 1988 adopting the second phase of the programme on cooperation between universities and industry regarding training in the field of technology (Comett II) (1990 to 1994), OJ L 13/28 of 17/1/89.

[432] Article 1 of Decision 87/327/EEC of 15 June 1987 adopting the European Community Action Scheme for the Mobility of University Students (ERASMUS), OJ L 166/20 of 25/6/1987.

[433] According to the addition introduced by Council decision 89/663/EEC amending the previously quoted decision, OJ L 395/23 of 30/12/1989.

[434] Article 2 of the Decision 87/327/EEC, quoted supra.

[435] Council Decision 89/489/EEC of 28 July 1989 establishing an action programme to promote foreign language competence in the European Community (Lingua), OJ L 239/24 of 16/8/89.

[436] Article 3 (a) of the Programme, adopted by the Decision 819/95/EC of the European Parliament and of the Council of 14 March 1995, OJ L 87/10 of 20/4/95.

[437] See Action 2 of chapter II of the annex to the Programme (quoted in the preceding footnote), which concerns education of the children of migrant workers, of occupational travellers, travellers and gypsies, as well as inter cultural education.

[438] Council Decision 92/217/EEC of 16 March 1992 on a specific research and technological development programme in the field of human capital and mobility (1990 to 1994), OJ L 107/1 of 24/4/92.

[439] Idem, Point I (1) of Annex III.

As far as children's education is concerned, the most important Community instrument is the Council Directive of 1977 on the education of children of migrant workers.[440] This Directive provides for free tuition to facilitate the initial reception of children, including the teaching of the host country's language.[441] Moreover, it envisages the teaching of the children's mother tongue and of the culture of their country of origin.[442] However, this Directive only applies to children dependent on nationals of Member States.[443] On 25 July 1977, on the occasion of the adoption of the Directive, a declaration was added to the minutes of the Council, in which Member States expressed the political will to ensure that the measures to be taken by all Member States in compliance with this Directive would equally meet the needs of children of nationals of other Member States, of children from third country backgrounds and, in general terms, of children not covered by this Directive.[444]

The Commission has recognised the great importance of the education of children of third country nationals. It has stated that:

> "(...) a massive investment in the education and training of all young people, foreigners [third country nationals] and EC nationals alike, is clearly in the interest of the Member States themselves and of the Union as a whole."[445]

Accordingly, since 1976, the Commission has been promoting, in cooperation with Member States, pilot projects on the education of migrant children, including children from third countries.[446] These projects have given priority to the teaching of the language of the host country, as well as to the teaching of the immigrants' mother tongue. These are the main objectives of the above mentioned Directive on the education of children of migrant workers, which applies only to children of the families of migrant nationals of a Member State. However, it would be an exaggeration to say that, in this manner, the Commission is applying the Directive to children of families of third country nationals. In fact, the Directive establishes certain objectives, for the achievement of which Member States have the duty to act. As far as third country nationals are concerned, such objectives cannot be implemented by the Commission acting alone. The Commission can

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440 Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers, OJ L 199/32 of 6/8/77. The Council has also adopted two resolutions on school provision for children of occupational travellers, and of gypsy and traveller children, which were adopted jointly with the Ministers of Education meeting within the Council: Resolutions of 22 May 1989, OJ L 153/1 of 21/06/89; and of 22 May 1989, OJ C 153/3 of 21/6/89, respectively. For an overview of the Community activities on education of children of migrant workers see the Commission's Report on the education of migrants' children in the European Union, COM (94) 80 final, of 25/3/1994.

441 Article 2 of Council Directive 77/486/EEC.

442 Idem, Article 3. This Article states that "Member States shall, in accordance with their national circumstances and legal systems, and in cooperation with States of origin, take appropriate measures to promote, in coordination with normal education, teaching of the mother tongue and culture of the country of origin" of those children.

443 Ibidem. Article 1.

444 SEC (90) 1813 final, pg. 24. In the words of the Commission Communication on Immigration adopted in 23 October 1991, this declaration to the minutes is surprisingly turned into a "Resolution attached to the Council Directive [mentioned supra], which has already outlawed any discrimination based on the pupil's nationality". See SEC (91) 1855 final, pg.26.

445 COM (94) 80 final, of 25/3/1994, paragraph 16.

446 Commission communication on immigration and asylum policies, of 23 February 1994, presented to the Council and the European Parliament, COM (94) 23 final, at p. 37.

only cooperate with the Member State programmes in this area. Thus the Commission presented a proposal for reinforcing and extending this cooperation, in the framework of the above mentioned Socrates action programme.

The adopted version of the programme turn out to be slightly less far reaching than the Commission's draft.[447] One of the three types of action of the programme relates to the promotion of inter cultural education and the improvement of the quality of schooling for children of migrant workers, of gypsies and of occupational travellers. Financial assistance may be allocated to projects aiming, inter alia, to promote equal opportunities for those children.[448] In the meantime, contrary to the Directive of 1977 on the education of children of migrant workers, the Socrates programme does not exclude children of third country nationals from the beneficiaries of the programme. Therefore, in view of its Preamble, its explicit aims and the actions it envisages, it may be concluded that the programme is clearly intended to cover children of third country nationals.

3 - OTHER PROVISIONS OF EC LAW

a) EC officials

Among the other provisions of EC Law that also apply to third country nationals, there is article 12 of the Protocol on the Privileges and Immunities of the European Communities. This article states that the Protocol applies to all Community officials "whatever their nationality". Thus, in this respect, officials of the Institutions of the European Union who are third country nationals have the same rights as their colleagues who are nationals of a Member State.

b) Access to Justice

Nationals of third countries have the possibility of defending their legal position under Community Law. They are entitled to do so either by replying to Commission letters,[449] or by presenting their case to the Court of Justice of the European Communities. The rules on the latter establish that:

> "Any natural or legal person may (...) institute proceedings against a decision addressed to that person or against a decision which (...) is of direct and individual concern to [him or her]."[450]

and that:

> "Member States, Institutions of the Community and any other natural or legal person may (...) institute proceedings to contest a judgment...".[451]

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[447] Parliament and Council decision No. 819/95/EC of 14 March 1995, OJ L 87/10. Cf. the Commission's draft COM (94) 180 final, of 16/5/1994.

[448] Action 2 of chapter II of the annex to the Programme, adopted by the Parliament and Council decision quoted in the preceding footnote. Cf. with the Preamble of the Commission's proposal; and Article 3(ii) of that proposal, referring to "citizens who live in the Community" (Commission's emphasis), COM (94) 180 final.

[449] As provided, for instance in several competition, anti-dumping and Common Customs Union regulations. But, as explained above, these fields are not the main concern of this dissertation.

[450] Article 173 (4) of the EC Treaty.

Other provisions on judicial action do not exclude third country nationals from their personal scope. Therefore, provided third country nationals are protected by Community Law, they have the procedural right to defend their legal position and interests.

As will be referred to in chapter 7, after the entry into force of the Treaty on European Union, third country nationals residing in a Member State have been formally granted the right to address petitions to the European Parliament and the right to make complaints to the European Ombudsman.[452]

Concluding Remarks - Section C

The fundamental conclusion of this section is that a considerable part of *Community legislation on social and educational matters is applicable to nationals of third* countries living in the European Union. The application to third country nationals of Community rules in these matters seems to constitute further grounds to argue for the extension of EC Law on free movement of persons to third country nationals permanently residing in the Union, as suggested before. Besides the substantial reasons, a greater coherence of Community Law would be achieved in this manner.[453]

In some cases, EC legislation on social matters (except on free movement) and on education explicitly states that it also applies to third country nationals. However, most of that legislation states that it applies to categories of persons defined or referred to only in generic terms, with no reference being made to their nationality. Usually such legislation does not seem to have any contextual elements that work against its application to third country nationals. Moreover, its purposes are often coherent with (or not, at least, contradicted by) that application. It, thus, seems reasonable to consider that such legislation also applies to permanently resident third country nationals. There does not seem to be a need to invoke an extensive interpretation of that legislation to reach such a conclusion on its personal scope.

Therefore, it is submitted that there should be a presumption of a general personal scope of Community legislation, as long as no clear textual, contextual, or teleological elements contradict such a possibility. This seems to be particularly justified when the objectives of the social or educational legislation relate to the society as a whole, and to socially disadvantaged groups in particular - as in the case of the fight against poverty and exclusion. Furthermore, it would frequently be awkward to make artificial distinctions in order to apply that legislation in a different manner to nationals of Member States and to third country nationals.

In addition, it is also important to note that the application of Community legislation to third country nationals is not exclusive to the areas examined above. Most

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451 Article 39 of the Protocol on the Statute of the Court of Justice of the European Communities. Article 40 of the same instrument also uses a generic expression by referring to "any party".

452 Articles 138 D and 138 E of the EC Treaty, as amended by the Treaty on European Union.

453 Naturally, it may be argued that there are policy reasons to differentiate between the application of EC social, education and labour legislation, on one part, and EC rules on free movement of persons, on the other. However, I believe that, in the current process of European integration and given the present situation of third country nationals resident in the Union, the reasons to harmonise the personal scope of both areas of legislation should take precedence.

EC legislation on health or consumer protection, for example, is applicable to nationals of Member States and third country nationals alike.

These conclusions highlight the difference between the personal scope of Community rules on free movement of persons and on other matters. Arguably, this difference constitutes a contradiction. The fact that most Community legislation applies to nationals of Member States and third country nationals residing there alike, means that both groups of persons are part of the European society.[454] Third country nationals require attention at a European level in the area of the relevant Community legislation. They are thus included under its personal scope. They come under that scope not in the capacity of third country nationals but as workers, disabled, young or poor people, social assistance beneficiaries, students, researchers, or Community officials. In other words, as persons living in the European Union.[455]

On the other hand, third country nationals are basically excluded from the scope of the Community rules on free movement of persons. This seems to contradict the fact that third country nationals residing in the European Union are part of the European society.

CONCLUSIONS OF THE CHAPTER

The main concern of this chapter was to highlight the imperfections of Community Law on free movement as far as third country nationals are concerned. The main negative aspect of Community Law in this regard seems to be the fact that it is not fully applicable to resident third country nationals, namely as far as free movement of workers is concerned. While sections A and B of this chapter dealt with Community Law on free movement, section C examined the personal scope of EC legislation in other areas, notably in relation to social matters and education.

Section A examined the rights assigned to third country nationals by Community Law on free movement, irrespective of any family relationship with a national of a Member State.

As far as free movement of goods and capital is concerned, third country nationals are in a similar position as that of nationals of a Member State. However, the most questionable aspect of the system relates to the absolute use of the nationality criteria to define the personal scope of EC rules on free movement of persons. This reinforces the underlying idea that third country nationals are under the scope of Community Law only in exceptional (although important) circumstances. The absolute use of the nationality

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[454] An official support for this idea seems to come from the Declaration Against Racism and Xenophobia, adopted by the European Parliament, the Council and the Commission, together with the representatives of the Member States within the Council, OJ C 158/1 of 25/6/86. That declaration affirms their resolve to protect, and declare that they are determined to pursue the endeavours already made to "protect the individuality and dignity of every member of society and to reject any form of segregation of foreigners" - points 2 and 4 of the mentioned declaration. Note that the declaration refers explicitly to third country nationals.

[455] In the Member States, under the European Union (and thus also Community) legal order.

criteria may be found in relation to several rules of Community Law, either in their own wording or in the interpretations of them. It sometimes entails singular interpretations and even peculiar consequences.

One of these interpretations corresponds to the established view on the personal scope of Article 48, according to which "workers of the Member States" means workers who are nationals of the Member States. An explanation was given as to why this interpretation was not, to say the least, based on a more sound legal basis than is an interpretation that would include third country nationals in the personal scope of that Article. It was suggested that, instead, Article 48 could be interpreted as being also applicable to all third country nationals with permanent residence in the Community. For these purposes, it could be considered that a third country national is a permanent resident in the Community in two cases. One is that, under positive national law, he or she has an unlimited right of residence in one Member State. The other is that he or she has resided in one or more Member States, for more than a total of 10 continuous years, or for fifteen non-continuous years. Moreover, the application of EC Law on free movement of persons seems to be particularly justified in the case of refugees. I suggested that after three years of legal residence in the Community they be granted EC rights in this respect, on equal terms to nationals of a Member State.

Another legal interpretation open to criticism relates to the so-called principle of "Community preference" in access to the labour market of Member States. The precise limits of this principle were examined and it was concluded that, in binding legal terms, the legal regime in force amounts to not much more than a general principle of non-discrimination among nationals of Member States. This does not necessarily go against the position of third country nationals, contrary to what is usually presumed.

In relation to the peculiar consequences of the exclusion of third country nationals from the personal scope of the EC Law, several examples concerning EC rules on free movement were reviewed. Reference was made, inter alia, to the definition of the personal scope of Reg. 1408/71, on coordination of social security schemes for persons who have worked in several Member States;[456] to the difference of treatment of natural persons who are nationals of a third country and legal persons founded and controlled by third country nationals; and to the fact that third country nationals residing in a Member State are not entitled to provide services in another Member State, except if they are workers of an enterprise of a Member State.

Section B examined the rights granted under the Community rules on free movement to third country nationals due to their family relationship with a national of a Member State. An important contribution has been made by the Court of Justice in this area, in particular as regards the definition of the legal status of relatives of migrant nationals of a Member State, when such relatives come within the scope of Community Law. However, there are several points that remain to be improved. One of those relates to reverse discrimination, the grounds of which were challenged. However, this section analysed in particular the situations of divorced spouses and partners of a national of a Member State. It was argued that failure to grant them a right of residence in the host

456 Article 2 of the Regulation.

Member State could be, not only contrary to a correct interpretation of the relevant Community rules, but also contrary to the best interpretation of the European Convention on Human Rights.

Finally, in section C it was shown how Community legislation is in most occasions applicable to nationals of third countries who are residents in the European Union, notably in what relates to social matters and education. In some cases, this application to third country nationals is quite clear and even explicit. In other cases, it derives from a correct interpretation of the wording, context and objective of the relevant EC legislation. The fact that most Community legislation includes in its personal scope resident third country nationals and nationals of Member States alike, is a further reason to support the idea that both groups of persons are part of European society. This sort of de facto social membership of third country nationals living in the European Union seems to contradictory to the fact that they are basically excluded from the scope of the Community rules on free movement of persons. It could perhaps be said that such rules constitute the fundamental exception in the application of Community Law to third country nationals. Insofar as there is no particular justification for such an exception, the latter manifests an inconsistency in the Community legal system.

It is of the utmost importance to emphasise that it would be in the interest of the European Union as a whole to extend to third country nationals the Community rules on free movement of persons. It does not seem very coherent, for instance, to bar third country nationals from a powerful instrument of social integration - free movement for labour - and then to establish programmes that can be used to promote their social integration. The social exclusion of third country nationals should be better considered before it happens, not only afterwards. Action against the social exclusion of third country nationals living in the Union is particularly relevant considering the fact that they are a very large number of people. It would be negative for Europe to let them stay in or go to the margins of society.

Besides, resident third country nationals contribute substantially to the economic well-being of the Community and, generally, to its very objectives, namely as defined in Article 2 and 3 of the EC Treaty. Moreover, as members of the European society, third country nationals suffer all the direct and indirect disadvantages of European economic integration.[457] Therefore, they should also be entitled to benefit from all of its advantages.

The progressive harmonisation of national immigration policies at the level of the European Union reinforces the idea that those allowed by the Union to enter and reside in a Member State should be allowed to become full members of the Union - at least as far as free movement of persons is concerned. If third country nationals enter the Union under rules commonly agreed by the Member States, they should be entitled to participate fully in the economic and social entity that these Member States constitute.

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[457] For example: a third country national living in the Community is more likely to be unemployed than the average national of a Member State.

A general legal argument can also be used in this respect. The Community is a Community based on the rule of Law.[458] A general principle of Law, which is fundamental in any society based on the rule of Law, is the principle of equality - i.e. that equal situations should be equally treated. For the purposes of enjoying the right of free movement, the situation of nationals of a Member State should be seen as equal to the situation of third country nationals permanently residing in the Union. This conception is also based on the idea that the right of free movement should be seen more as a social and an economic right than as a political right pertaining to nationality and citizenship. To the extent that this perspective is justified, it seems that a differential treatment between long resident third country nationals and nationals of Member States, in this respect, amounts to discrimination. Arguably, the differential treatment is not justifiable by, or proportional to the fact of holding or not the nationality of a Member State.

A final word has to recall that social and economic difficulties are likely to arise from the granting of free movement rights to several millions of third country nationals currently living in the Union. These predictable practical problems should be addressed by a policy response. The extension of free movement rights to third country nationals could be done in a progressive manner to diminish practical problems. However, the policy response to such practical problems cannot be to prolong the present exclusion of third country nationals.

The basic exclusion of third country nationals from the EC rights on free movement of persons is reprovable both from a legal and from a practical, social point of view. In the present state of European integration, and taking into consideration the value of material justice, the absolute use of the criteria of nationality should be rejected. In defining the beneficiaries of freedom of movement among Member States, the nationality criteria should be mixed with the criteria of permanent residence in the Community.

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458 See case 294/83 Les Verts v. European Parliament [1986] ECR 1339, paragraph 23; and Opinion 1/91 on the EEA Agreement, [1991] ECR I-6079, paragraph 21.

Chapter 5

The Legal Status of Third Country Nationals under COMMUNITY AGREEMENTS WITH THIRD COUNTRIES

INTRODUCTION

This chapter analyses agreements concluded by the Community and its Member States with third countries, which contain rules on the legal status of nationals of the latter countries in the European Union.[1]

These agreements are a fundamental part of Community Law concerning third country nationals resident in the Union. First, they were concluded with the countries whose nationals form about half of the population of third country nationals living in the European Union.[2] Secondly, the agreements contain important rules on the rights of nationals of the relevant third countries. Such rules regard important matters, like the rights of workers and their families, and, in some cases, the right of establishment and the right to work as self-employed persons in the Member States. Moreover, the Court of Justice has, in some cases, recognised direct effect to provisions of the agreements and to rules of Decisions of the Association Councils set up in their framework.[3] Thirdly, the rules of such agreements are important as guidelines of what could be a Community policy on all third country nationals.

In chapter 2 it was recalled that, although the agreements are considered to be mixed agreements because governments of the Member States considered that the legal status of third country workers is outside the Community competence, the Court of Justice of the European Communities declares itself to have jurisdiction to interpret the agreements.[4] In this respect, the rulings of the Court have been quite daring, contrasting with the positions expressed by the Member States. The Court has, for instance, already considered that the Community has powers under Article 238 of the EC Treaty to conclude association agreements with third countries, which contain provisions on free

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[1] However, this chapter does not deal with the new rules introduced by GATS. On the Agreements analysed in this chapter see Akandji-Kombé, J.-F., "Les Droits des Étrangers et Leur Sauvegarde dans l'Ordre Juridique Communautaire", *CDE*, Vol.31, 1995, Nos.3-4, pp.351-381; GISTI, *La Circulation des étrangers dans L'Espace Européen*, Paris, June 1994, pp.23-35; Johnson, Esther & O'Keeffe, David "From discrimination to obstacles to free movement: Recent developments concerning the free movement of workers 1989-1994", *CMLRev*, Vol.31, December 1994, No.6, pp.1313-1346, at 1342-1344; Maresceau, Marc "Nationals of third countries in agreements concluded by the European Community", *Actualités du Droit*, 1994, No.2, pp.249-263; the good article by Peers, Steve "Toward Equality: Actual and Potential Rights of Third-Country Nationals in the European Union", *CMLRev*, forthcoming; Raux, Jean "La mobilité des personnes et des entreprises dans le cadre des accords externes de la C.E.E.", *RTDE*, Year 15th, 1979, No.3, pp.466-479; Stangos, Petros N. "Les ressortissants d'états tiers au sein de l'ordre juridique communautaire", *CDE*, Vol.28, 1992, No.3-4, pp.306-347.

[2] In 1992, there were in the present 15 Member States around 5 million persons with the nationality of one of the following countries: Turkey, Algeria, Morocco, Tunisia, Poland, Hungary, Czech Republic and Slovakia. By then, the total population of third country nationals was 10 million persons (for this purpose Austria, Sweden and Finland were here considered as if in 1992 they were already Member States). See Eurostat *Rapid Reports on Population and Social Conditions*, 1994, No.7, pp.6-7.

[3] For the Agreements under analysis in this chapter see case 12/86, Demirel [1987] ECR 3719, paragraph 14, in which was at stake the Association Agreement with Turkey; and for the decisions of the EC-Turkey Association Council see, e.g., case 192/89, S. Z. Sevince V. Staatssecretaris van Justitie [1990] ECR 3461, paragraph 15, and case C-18/90, Office National de l'Emploi V. Bahia Kziber, [1991] ECR I-199, paragraph 15. See infra, section B, for more details. See also case 87/75 Bresciani [1976] ECR 129; case 17/81, Pabst & Richarz [1982] ECR 1331; and case 104/78 Kupferberg [1982] ECR 3641.

[4] See chapter 2 for discussion on this topic.

movement of workers from those third countries.[5] However, the issue of competence having been dealt with in chapter 2, this chapter concentrates in the substantive content of the agreements and on the precise legal effects of their rules.

Section A of this chapter makes a general overview of the several agreements containing rules on the legal status of third country nationals in the European Union. The review to be made comprises the Association Agreement with Turkey (and its Additional Protocol, as well as and decisions of the EC-Turkey Association Council), the Cooperation Agreements with the Maghreb countries and Yugoslavia, the Agreement on the European Economic Area, the "Europe Agreements" establishing an Association with Central and Eastern European Countries, and the Agreements on Partnership and Cooperation with some countries of the ex-Soviet Union. Reference will also be made to some declarations annexed to the Lomé Convention and to the Joint Declaration with the Mashreq Countries. Section B of this chapter examines specific issues in the content of such agreements and refers to some legal problems regarding the interpretation of their rules. First, the rights of workers and their families will receive particular attention. Analysis will be made, namely, of rules concerning the right of the workers to ... work and reside in a Member State, the prohibition of discrimination of the workers on the grounds of nationality, the rights of the family members of the workers, and social security. Secondly, reference will be made to rules on freedom of establishment and provision of services. Thirdly, common and final rules of the agreements will be dealt with - including limitations to the rights and cooperation envisaged with the Community.

A) THE AGREEMENTS - AN OVERVIEW

1 - Association Agreement with Turkey

The Association Agreement with Turkey[6] was concluded on 12 September 1963, when the Community only had the six original Member States.[7] It was then made in view of the future accession of Turkey to the EEC, and, in the Preamble, it was even stated that both parties were determined to establish "an ever closer union" between the Turkish people and the peoples of the Member States of the European Communities. With this idea in mind, the Treaty envisaged the steps of a transition for accession. Article 12 of the

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[5] Demirel, case quoted, at paragraph 9, in which the Association Agreement with Turkey was at stake.

[6] OJ 217/3687, of 29/12/1964. This agreement entered in force on 1/12/1964. For an analysis of this Agreement, or some aspects of it, see Burrows, Noreen "The rights of Turkish workers in the Member States", *ELR*, Vol.19, June 1994, No.3, pp.305-308; Cicekli, Bulent "Turkish immigrants in Europe: a literature and case review", *INLP*, Vol. 9, 1995, No.2, pp.67-69; Guedalla, Vicky "Turkish workers, residence rights and family unity: some aspects of the Ankara Agreement", *INLP*, Vol.7, 1993, No.4, pp.119-122; Lichtenberg, H., "The Rights of Turkish Workers in Community Law-Kazim Kus v. Landeshauptstadt Wiesbaden; Hayriye Eroglu v. Land Baden-Württemberg", *Industrial Law Journal*, Vol. 24, March 1995, No.1, pp.90-97; Huber, Bertold "Das Sevince-Urteil des EuGH: Ein neus EG-Aufenthaltsrecht für türkische Arbeitnehmer", Vol.10, *NVwZ*, 1991, No.2, pp.242-243; and Wornham, Trevor *The Immigration Lawyer's Guide to the Turkey-EC Association Agreement*, London, ILPA, March 1994. See also the interesting article by Groenendijk, C.A. "Betekenis Associatie EEG-Turkije voor Turkse werknemers in Nederland: Hoe soft law hard wordt gemaakt?", *Migrantenrecht*, 1994, No.10, pp.199-208.

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Agreement, for instance, provided that the parties would inspire themselves in articles 48, 49 and 50 of the EC Treaty for the purpose of "progressively securing freedom of movement for workers between them". Accordingly, an Additional Protocol to the Agreement,[8] signed in 23 November 1970, established that this freedom would be gradually realised between 1 December 1976 and 1 December 1986.[9] This was never actually implemented.

Meanwhile, the Association Council adopted three decisions relevant to the status of Turkish nationals in the Member States. Decision 2/76, adopted in 1976, grants to workers the right of access to the labour market, under certain conditions, and to their children, legally residing with them, the right to general education. On 19 September 1980, the Association Council adopted Decision 1/80 and Decision 3/80.[10] Decision 1/80, inter alia, develops further the rules on access to the labour market of Turkish workers, grants to members of their family (legally resident) the right of access to the labour market, and to their children the right of access to courses of general education, apprenticeship and vocational training, in conditions equal to the children of Member States. Decision 3/80 deals with the application of social security schemes of the Member States to Turkish workers and members of their families - extending to them most of the Community Law rules on the matter.

The rules of the Agreement with Turkey and of the Protocol to it, together with the provisions adopted by the Association Council, constitute the most elaborated set of rules on the status of third country national workers (and members of their families) in force under any agreement between the Community and a third country - with the exception of the EEA Agreement. Nevertheless, the initial aim of accession of Turkey to the Union does not seem to be within reach in the near future.[11] During 1994 and 1995 negotiations were held to conclude a customs union between the Community and Turkey.[12] The assent of the European Parliament to the customs union was finally given on 13 December 1995.[13]

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[8] OJ L 293/3 of 29/12/1972. This Protocol entered in force on 1/1/1973.

[9] Article 36 of the Additional Protocol.

[10] Note that work for the implementation of Decisions 2/76 and 1/80 has already been developed. See, e.g., Press Release CEE-TR 119/92, Brussels, of 9/11/1992, point 1. c).

[11] See the Commission's opinion on Turkey's request for accession to the Community, SEC (89) 2290, of 18/12/1989; and Kramer, Heinz "EC-Turkish relations: Unfinished forever?" in *Europe and the Mediterranean*, London, Brasseys/ Macmillan, 1994, pp. 190-249.

[12] The 36th meeting of the EC-Turkey Association Council, held on 6/3/1995, achieved Agreement in principle on the implementation of the final phase of the customs union with Turkey. See *Week in Europe*, 9/3/1995, and the Press Release of that meeting (PRES/95/78). The latter states that, in a Resolution adopted by that meeting on the development of the Association, cooperation on Justice and Home Affairs is envisaged. As far as social cooperation is concerned, the resolution planned a regular dialogue on the situation of Turkish workers legally employed in the Community and declared that both Parties will explore every possibility for a better integration of these workers. See also the draft decision of the Council on a common position by the Community in the EC-Turkey Association Council for the adoption by the latter of a decision on the implementation of the final phase of the customs union between the Community and Turkey - doc.ref. 7092/95, Limite, NT 11, of 9 June 1995, Council of the European Union, Interinstitutional file No. 95/0101(ACC).

[13] However, this approval by the European Parliament of the customs union with Turkey was uncertain for a long time, mostly due to the deplorable situation in that country as far as human rights are concerned. The approval of the Parliament is required for agreements based in Article 238 of the EC

2 - Cooperation Agreements with the Maghreb countries and Yugoslavia

In April 1976, the Community and its Member States signed Cooperation Agreements with Algeria, Morocco and Tunisia.[14] A Cooperation Agreement with Yugoslavia was only signed four years later, in April 1980.[15] Following the war in that country this agreement was suspended on 11 November 1991.[16]

All four agreements have the same content, as far as workers and their families are concerned. They establish the principle of non discrimination on grounds of nationality in what regards working conditions, remuneration and social security. Furthermore, they provide for the addition of periods of insurance, employment or residence for the purpose of pensions, annuities and medical care, and provide also for free transfer of pensions and annuities. The exact same rules of these agreements were also proposed by the Commission in 1991 in the draft customs union and cooperation agreement with San Marino.[17]

The agreements with the Maghreb countries and Yugoslavia [hereinafter Maghreb Agreements] introduced important rules in the legal status of the nationals of the third countries concerned. However, when the agreements were concluded, to a certain extent their content proved deceptive for the Maghreb countries. Lead by Algeria, those countries had asked for the right of free movement within the Community for their nationals working there. They also asked for a general right to equal treatment with workers who are nationals of a Member State. Finally, they asked for the right of their

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Treaty, as was the Association Agreement of 1963 and the additional protocols to it. The European Parliament expressed the fear that the Commission and the Council intended to adopt the customs union agreements on a different basis in order to avoid the need for the Parliament's consent, see the oral question of the European Parliament No. H - 0212 and 0213/95 for question time at the party session in April 1995. However, in the draft decision of the Council, quoted by the end of the preceding note, it is envisaged the consultation of the European Parliament, "with a view to obtain the Assent necessary for the adoption" of the decision of the EC-Turkey Association Council on the implementation of the final phase of the customs union with Turkey. Such assent was, in the end, requested and finally obtained on 13 December 1995.

[14] Agreement with Algeria: OJ L 263/2; with Morocco: OJ L 264/2 and with Tunisia: OJ L 265/2, all of 27/9/1978. For an examination of these Agreements see Guild, Elspeth *Protecting Migrants Rights: Application of EC Agreement with Third Countries*, Brussels, CCME, Briefing Paper No.10, 1992, and her "Protecting Migrants Rights and Community Law: The Cooperation Agreements with Algeria, Morocco and Tunisia", *INLP*, Vol.7, 1993, No.1, pp.15-18; Mezdour, Salah "L' Émigration maghrébine en Europe", *RMCUE*, March 1993, No.366, pp.237-241; and Nadifi, A., "Le Statut Juridique des Travailleurs Maghrebins Residant Dans la CEE", *RMC*, 1989, No.327, pp.289-295.

[15] OJ L 41/2 of 14/2/1983.

[16] Decision 91/586/EEC of the Council and the Representatives of the Governments of the Member States, meeting within the Council, OJ L 315/47 of 15/11/91. See, however, Council Regulation (EC) 984/95 of 28 April 1995, OJ L 99/1 of 29/4/1995. For the record, the relevant provisions of the Agreement with Yugoslavia will be mentioned in the footnotes, along with the provisions of the Cooperation Agreements with the Maghreb countries; however in the main text the Cooperation Agreements with Algeria, Morocco, Tunisia and Yugoslavia will be referred to only as "Maghreb Agreements".

[17] See Articles 20 to 22 of that draft Agreement, in OJ C 302/12 of 22/11/91.

workers to receive vocational training. This training was meant to be organised so that it would be useful when the workers returned to their countries of origin.[18]

In the beginning, the Member States of the Community did not envisage the inclusion in the agreements of any rules on workers. One of the arguments invoked was that the Community had no competence here. Only after more than 3 years of negotiation was it possible to agree on these provisions. The important novelty in these agreements was the possibility of adding up, for social security purposes, periods of work carried out in different Member States.[19] For the rest, it may be said that most provisions of the agreements in this area simply restate certain rights already acquired, when they mention them at all. This is particularly true in relation to Member States where the workers of the Maghreb countries are mostly concentrated in the Community.

At the same time as these agreements were being made with the Maghreb countries, the Community also concluded, in 1978, Cooperation Agreements with Israel and the Mashreq countries (Syria, Jordan, Lebanon and Egypt). None of the latter agreements contained provisions in the social field.

Recently, on 12 April 1995, the Community concluded with Tunisia an Agreement of economic association, which may be the first step for a future free-trade agreement with that country. The agreement with Tunisia is the first of similar agreements to be concluded with Mediterranean countries with the aim of strengthening relations between them and the Community. In the following month, the Commission presented a draft Euro-Mediterranean Agreement establishing an association with Tunisia.[20] This latter draft agreement is meant to be a further step in the relations between the Community with Tunisia. It does not develop much further the rights of workers and their families,[21] but provides for a more extensive cooperation between the Community and Tunisia.[22]

A similar agreement is now being negotiated with Morocco.

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[18] More daring proposals did not disappear, meanwhile. Note, e.g. that in June 1993 the Tunisian president made a speech, in the European Parliament, proposing the elaboration of a Euro-Maghreb Charter which would define the rights and duties of immigrants of the Maghreb countries in the EC. See Agence Europe, No. 6006 (n.s.), of 23/6/1993.

[19] Like in other Agreements it is not possible to take into account periods performed in the country of origin. Not even proportionally, according to the amounts paid in each country (of the Community and in the country of origin).

[20] Draft Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, on the other part, COM (95) 235 final, of 31/5/1995.

[21] The only significant difference is that the non discriminatory treatment of workers would extend also to temporary workers who had been "allowed to take paid employment" - Article 64 (2).

[22] See Articles 69 and 71.

3 - The Agreement on the European Economic Area[23]

. Relations between the European Community and member countries of the European Free Trade Association[24] are not a new phenomenon. Bilateral free trade agreements with individual Member States of that organisation were established by the Community as early as 1972.[25] The need for a different relationship became clear after the launch and progressive implementation of the internal market project. The idea of a new partnership gained a new impetus when, in 1989, Jacques Delors made a proposal for different relations, including common decision making and administrative institutions.

Negotiations started in July 1990 between the European Community (and its Member States) and Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. An agreement was reached with those countries in October 1991. However, the negative opinion of the EC Court of Justice on the provisions on the judicial control, obliged the Agreement to be negotiated again and a second draft was signed in Oporto, in Portugal, on May 1992. A second factor delayed the entry into force of the Agreement when, on 6 December 1992, a referendum in Switzerland refused its ratification. A new protocol had to be signed in March 1993. The EEA Agreement entered into force on 1 January 1994. Austria, Finland and Sweden acceded to the European Union on 1 January 1995.[26] Thus, at present, besides the Community and its Member States, only Iceland, Norway, and Liechtenstein are party to the EEA Agreement.[27]

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[23] For an analysis of the EEA Agreement see e.g. Evans, Andrew *The Law of the European Community, including the EEA Agreement*, Deventer, Kluwer, 1994; Gladstone, Robert C. "The EEA Umbrella: Incorporating Aspects of the EC Legal Order", *LIEI*, 1994, No.1, pp.39-71; Jacot-Guillarmod, O. (ed.) *EEA Agreement - Comments and reflexions*, Collection de Droit Européen, Vol.9, Zurich, Schulthess Polygraphischer Verlag; 1992; Norberg, Sven et al. *EEA Law - A Commentary of the EEA Agreement*, Deventer, Kluwer, 1993. See also Cremona, Marise "The 'Dynamic and Homogeneous' EEA: Byzantine Structures and Variable Geometry", *ELR*, Vol.19, October 1994, No.5, pp.508-526; O'Keeffe, D. "The Agreement on the European Economic Area", *LIEI*, 1992, No.1, pp.1-27.

[24] While the European Economic Community was created in 1957, the European Free Trade Association was established in 1960 between countries who did not accept the integration objectives of the Community. The initial members were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. By a Protocol appended to the founding Convention, the latter applies to Liechtenstein, to be represented by Switzerland. Meanwhile, Finland associated with EFTA in 1961, entering into full accession only in 1986. Iceland acceded in March 1970. An Agreement with Spain entered in force in 1980. It was denounced in 1985, to have effect by the end of the year, due to the entry of Spain (as Portugal) to the European Communities.

[25] In that year, two Member States of EFTA, the United Kingdom and Denmark, left the Association and acceded to the European Communities. Agreements were then concluded with Austria, Portugal, Sweden, Switzerland, Finland, Norway and Iceland.

[26] Austria (on July 1989), Sweden (July 1991), Finland (March 1992), Switzerland (May 1992) and Norway (November 1992) had asked for accession to the Communities. A referendum in Norway refused accession to the European Union. A Referendum in Switzerland refused accession to the EEA and , namely, in view of this referendum, Swiss accession to the European Union seems highly unlikely for some years now. Note that Malta and Cyprus requested also accession to the Community, in 16 and 4 July 1990, respectively.

[27] Liechtenstein after 1 May 1995, following the decision of the EEA Council of 10/3/1995, see OJ L 86/58-9. Liechtenstein decided to accede to the EEA Agreement by referendum held in that country on 9 April 1995, with 55.9 % yes votes and 82% turnout.

The EEA Agreement may be considered less far reaching than the initial project. Nevertheless, it is the most ambitious and comprehensive agreement already concluded by the European Communities with EFTA countries.[28] It is also the first multilateral global agreement with those countries. The aim of the Agreement was the creation of an homogeneous economic area to the scale of western Europe. It applies to the EFTA countries most of the Community Law in force when it was concluded. It also provides for an extension to those countries of future legal instruments adopted by the Community institutions.[29] In practice, this treaty constitutes a kind of half accession of the EFTA countries to the European Communities. These had to incorporate somewhat more than half of the existing Community rules. Yet, they will have far less than half the rights of a full member in the Community decision making process.[30] With the accession of Austria, Finland and Sweden the practical importance of the EEA Agreement was considerably reduced. However, the Agreement maintains its value as an example of what can be an intermediate step for accession to the European Union.

a) Substantive content of the EEA Agreement

The EEA Agreement repeats most of the substantive rules of the Treaty of Rome.[31] The provisions related to the legal status of nationals of one country, which is party to the Agreement, in another country also party to the Agreement are no exception to this rule. The EEA Agreement basically extends to nationals of Iceland, Norway and Liechtenstein[32] the rules of the EC Treaty and Community secondary legislation on free movement of persons and on the social field in general terms. Therefore, the relevant rules of the EEA Agreement will only be dealt with in this section, not in section B, which analyses specific issues arising within external agreements on the legal status of third country nationals in the Union.

Within the chapters of the EEA Agreement on free movement of workers and the right of establishment, Articles 28 to 35 are based on the substantive rules of Articles 48 to 58 of the EC Treaty. Annexes V, VI and VII detail the specific modalities of application of rules on free movement of workers, social security, mutual recognition of professional qualifications and right of establishment, respectively.[33] In similar terms to the Treaty of Rome, free movement of workers will entail the abolition of discrimination on grounds of nationality between workers of Community Member States and workers of the EFTA

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[28] The expression "EFTA countries" is used to refer to the countries that are party of the EEA Agreement without being members of the European Union, as those countries were members of EFTA. Switzerland is also member of EFTA, but the EEA Agreement does not apply to it. Thus it is not included in the reference to the EFTA countries.

[29] In what concerns the existing rules of Community Law, several restrictions and delays of implementation are authorised. In relation to legal instruments to be approved in the future by the Community, special procedures are envisaged allowing the EFTA Member States to be exempted from them. However, the system is established in such a way as to make substantial exemptions very difficult and application of new Community instruments a rule.

[30] In the same sense see Krafft, Mathias Charles, "Le système institutionel de l'EEE - Aspects généraux", *EJIL*, Vol.3, 1992, No.3, pp. 285-299, at 299.

[31] With the necessary adaptations and some exceptions, but most of the times ipsis verbis.

[32] At the present moment.

[33] As provided by Article 119 of the Agreement, annexes to it (and the acts referred to therein, as adapted), as well as the Protocols, are an integral part of the Agreement.

countries. This, presumably, refers to workers who are nationals of the latter countries. The possibility of it referring to persons working in such countries, whatever their nationality, was not felt as needing to be discarded - in view of the institutional practice in the Community and of the case law of the Court of Justice on the correspondent Community rules, already analysed in chapter 4. Therefore, the relevance of the EEA Agreement for the legal position of third country nationals in the European Union is presently restricted to citizens of Iceland, Norway and Liechtenstein.[34] Therefore, we have to agree with Guild when she states that the discriminatory treatment, that different categories of third country nationals will have is a matter of concern.[35] Nationals of Iceland, Norway and Liechtenstein are granted free movement rights even if they have no connection with the European Union. Other third country nationals, already living in the Union for a considerable time, or even since they were born, will remain without those rights. This constitutes a material discrimination of the latter third country nationals. It confirms the character of "half-accession" of the EEA Agreement.

Free movement of persons was a central topic in the negotiations between the Community and some EFTA countries, notably Switzerland. In the campaign of the ratification referendum in Switzerland the supporters of the "No" insisted on the danger of the country being invaded by workers of the Community, even though complete free movement was provided to be delayed until 1 January 1998 for that country.[36] It should be recalled that Switzerland has a considerable proportion of foreigners among its population: 18%.[37] In any case, it is still envisaged that the development of future closer relations with Switzerland will also include free movement of persons among the issues in discussion.[38] Meanwhile, somehow envisaging the same type of problems, several EFTA countries[39] made Declarations warning that, if need may arise, they could impose safeguard measures in respect of free movement. Those measures would be based on Article 112 of the Agreement, which allows for safeguard measures in the case of "serious economic, societal or environment difficulties of a sectoral or regional nature liable to

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[34] And to their families, whatever their nationality, as provided by the relevant Community Law.

[35] Elspeth Guild, *Protecting Migrants' Rights: Application of EC Agreements with Third Countries*, op.cit., at pg.25.

[36] Protocol 15 to the EEA Agreement allowed Switzerland and Liechtenstein to have a special transitional period for the free movement of persons (not only workers). Its rules are now only valid for Liechtenstein, who had already obtained slightly more protective conditions than Switzerland. Protocol 16 to the EEA Agreement allowed the two countries to derogate from the provisions in the field of social security, as a consequence of the transitional periods of the former Protocol. A minor exception to the free movement derives also from the fact that the Agreement, in principle, will not apply to the Åland Islands, in Finland. Even if the Finnish government will declare that it applies, exemptions are already provided in the text of the EEA Treaty in what concerns acquisition of real property in those islands, as well as the right of establishment and the right to provide services there. See Article 126 of the Agreement.

[37] In the 1990 census 1.246.000 foreigners were counted as residents - of whom there were 81.000 Turks, 171.000 Yugoslavian, 383.000 Italians, 124.000 Spanish and 110.000 Portuguese. On the consequences for Switzerland of the rules on the free movement of persons see Haymann, Michael, "Approaching Europe : Swiss Prospectives and Dilemmas", in *LIEI*, 1992, No.2, p.71 at 82. On Austria see Seid-Hohenveldern, H.C.I., "Austria and the EEA", idem, p.29, at 43.

[38] See Press Release PRES/94/219, of 31/10/1994.

[39] Liechtenstein, Austria, Iceland (all of which also referred to eventual perturbations in the real estate market) and Switzerland.

persist". The response of the Community came in "replying" declarations:[40] it considered such statements would not make "prejudice to the rights and obligations of the Contracting Parties under the Agreement. " That is to say: the problems are to be solved only under the rules and procedures included in the EEA Treaty.

Finally, in the context of the movement of persons, a Declaration was made by the governments of the Member States of the Community and of the EFTA countries on the facilitation of border controls. It states that those countries will

> "cooperate with a view to the facilitation of controls for each other's citizens and the member of their families at borders between their territories".

This is said to be "subject to the practical modalities to be defined in the appropriate fora". One may wonder what this allusion refers to. It seems it does not refer to any entity or working group within the Council of Europe.[41] Presumably it refers to the intergovernmental cooperation then developed between Community Member States. Or even to cooperation provided for under Title VI of the by then already signed Treaty on European Union. The fact is that States that were parties to the Schengen agreements put pressure on the EFTA countries, who asked to join the European Union, to accede also to the Schengen agreements.

In relation to social provisions, Articles 66 to 71 of the Agreement are again a repetition of Community rules. They contain principles identical to those of Articles 117 to 119 of the Treaty of Rome. These provide for the respect of principles on the improvement of working conditions, health and safety of workers and equal pay for both sexes. Annex XVIII of the EEA Agreement determines to what extent secondary legal instruments implementing such Community rules will be applied in EFTA countries. Cooperation in the field of Social Policy, in general, is also envisaged.[42] Accordingly, the EFTA governments issued a Declaration endorsing the principles and basic rights laid down in the EC Charter of the Fundamental Social Rights of Workers.[43]

b) Specific Legal Issues

One of the most important legal issues regarding the EEA Agreement is whether its provisions, and provisions of EEA Law in general, may or may not have direct effect.

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[40] No Community reply was made on the Declarations of Liechtenstein and Iceland, presumably because of its small size and more vulnerable situation.

[41] All countries of both the European Communities and EFTA are members of the Council of Europe. See the European Agreement on Regulations Governing the Movement of Persons Between Member States of the Council of Europe, of December 1957, UNTS, vol.315, p.139; ETS 25. It provides for the facilitation of passage of frontiers for parties' nationals. In some circumstances even an identity card or an overdue passport is enough. The present parties to the Convention include Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Portugal, Malta, Netherlands, Spain, Switzerland and Turkey.

[42] Article 78 and Protocol 31 to the Agreement, and Article 5 of the Agreement.

[43] This is no surprise for those who are familiar with the EC Social Charter and have at least a superficial idea of the social and labour relations in the EFTA countries. On the reverse side of the issue, on whether the EEA Agreement and accession to the EEC may harm the Swedish Welfare State, see Joahansson, Sten, "L'Accord sur L'Espace Économique Est Suffisant " in *RMCUE*, June 1992, No.359, pp.494-500. See also Aubert, Gabriel "Le Droit suisse du travail au regard de l'acquis communautaire" in *EEA Agreement - Comments and Reflections*, Jacot-Guillarmod, Olivier (ed.), Collection de Droit Européen, vol.9, Schulthess Polygraphischer Verlag AG, Zurich, 1992, p.435.

In this regard two provisions are particularly important. Article 6 of the Agreement establishes that

> "(...) the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the [EC Treaty and the ECSC Treaty] and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement."

This could indicate that the provisions of the EEA Agreement which are similar to those of the Treaties of the European Communities could have direct effect if the necessary conditions were fulfilled. However, account has to be taken also of Protocol 35 to the EEA Agreement. It provides that

> "For cases of possible conflicts between implemented EEA rules and other statutory provisions , the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in such case."

Therefore, it seems that Van Gerven is right when he sustains that

> "The principles of primacy and direct effect of, at the date of signature of the EEA Agreement, existing identical legal rules are, by virtue of Article 6 EEA, an integral part of EEA law. Only to the extent that Protocol 35 deviates from the principle of primacy, and thus only for a period of time during which a Contracting Party has not (and should reasonably, not yet have) complied with the obligation assumed under that Protocol, can it be accepted that the principle of primacy, and in so far as it is linked thereto, the principle of direct effect, of EEA law is temporary inoperative."[44]

One other important legal problem that may arise is the conformity of rules of the EEA Agreement, of EEA law, and of acts of the EEA institutions with the European Convention of Human Rights.[45] The problem has already been discussed in the European Community. We shall see whether, on this issue, future case-law of the EFTA Court, of national courts of EFTA countries and of the Commission and Court of Human Rights of Strasbourg will repeat the doctrine used on the relations between Community Law and the European Convention on Human Rights.

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[44] See the conclusions of van Gerven, Walter "The Genesis of EEA Law and the Principles of Primacy and Direct Effect", *Fordham Int'l L.J.*, Vol. 16, 1992-3, No. 4, pp.955-989. See also Norberg, Sven et al., op. cit., at p.202-208, and Evans, op.cit., at p. 106-108.

[45] See Kälin, Walter, "The EEA Agreement and the European Convention for the Protection of Human Rights" in *EJIL*, Vol.3, 1992, No.3, p.341.

4 - "Europe Agreements" with Central and Eastern European Countries[46]

The concrete and political fall of the Berlin Wall and the consequent democratisation of the countries of Central and Eastern Europe [hereinafter Eastern European countries] was one of the most important events in recent times. It soon became clear that new relations had to be organised between the Community and those countries. They could no longer be treated as strangers. At some stage those countries will join the Community and fully participate in the construction of Europe.[47] Thus, in the meantime, their relations with the Community have to be pursued within a different framework - whilst that attractive, or "fearful", perspective does not materialise.

With the aim of preparing them for accession,[48] the Commission proposed the so called "Europe Agreements". These are association agreements covering a wide range of areas. They include provisions on political dialogue; on trade; on workers, establishment and services; on payments and movement of capital; on competition; on approximation of laws and on cooperation in selected areas - including the social area. They are also seen as mixed agreements, they were concluded by both the Community and its Member States, as some areas covered by them are seen as being outside of the Community competence. While the agreements were not ratified by the national Parliaments of the Community Member States, interim agreements entered into force between the Community alone and

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[46] See the European Agreements in force with Hungary, OJ L 347/2; and Poland, OJ L 348/2, both of 31/12/1993; Romania, OJ L 357/2; Bulgaria, OJ L 358/2; the Slovak Republic, OJ L 359/2 and the Czech Republic, OJ L 360/2, all of 31/12/1994. The Agreements signed with the Baltic countries were proposed by the Commission in COM (95) 207 final, of 2/6/1995. For the Agreement which is being negotiated with Slovenia, see COM (95) 341 final, of 12/7/1995. On the Europe Agreements see, inter alia, Benyon, F. S. "Les accords européens avec la Hongrie, la Pologne et la Tchécoslovaquie", *RMCUE*, 1992, No.2, pp.25-50; Maresceau, Marc "Les accords européens: analyse générale", *RMCUE*, 1993, No.369, pp.507-515; and Toledano Laredo, Armando "L'Union Européenne, L'Ex-Union Soviétique et les Pays de L'Europe Centrale et Orientale: Un Aperçu de Leurs Accords", *CDE*, 30th Year, 1994, No.5-6, pp.543-562. See also David, Richard "The Central European Dimension", in *The Dynamics of European Integration*, by Wallace, William (ed.), London, Pinter Publishers - The Royal Institute of International Affairs, 1990; Kennedy, D. and Webb, D.E. "The limits of integration: Eastern Europe and the European Communities", *CMLRev*, Vol.30, 1993, No.6, p. 1095-1118; Peers, Steve "An Ever Closer Waiting Room? : The Case for Eastern European Accession to the European Economic Area", *CMLRev*, Vol.32, 1995, No.1, pp.187-213; Redmond, John "The Wider Europe: Extending the Membership of the EC", in *The State of the European Community*, Vol. 2: *The Maastricht Debates and Beyond*, by Cafruny, Alan W. and Rosenthal, Glenda G. (ed.), Harlow, Lynne Rienner Publishers - Longman, 1993; and the Roth & Turner report of 30/3/1994 on immigration from Central and Eastern Europe and on the harmonisation of family reunion policy, made on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, doc.ref. A3-204/94.

[47] On the preparation of those countries to accession to the European Union see "The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession", COM (94) 320 final of 13/7/1994; the follow-up of the latter communication in COM (94) 361 final, of 27/7/1994; and the "White Paper" on "Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union", COM (95) 163 final of 3/5/1995.

[48] By the end of 1995, Hungary, Poland, Romania, Bulgaria, Latvia, Estonia and Lithuania, had applied to accession to the European Union. It is planned that the Czech Republic applies formally in January 1996.

the Eastern European countries. They cover areas on which the Community, as such, undoubtedly has competence to conclude external agreements. Hence, the interim agreements deal mainly with commercial issues and do not cover, e.g., the legal status of foreign workers.

Initially, Member States were not willing to grant many rights to workers who are nationals of Eastern European countries [hereinafter Eastern European nationals[49]]. The governments of the Member States were only prepared to make a general statement, declaring that due attention would be given to the rights of such workers living in the Community. At the most, Member States were prepared to subscribe something similar to the general declarations annexed to the Lomé Convention. However, during the negotiations with the Eastern European countries, it became clear that this would be not enough. Those countries, invoking their European character, were not prepared to accept less than what had been granted to Turkey, Yugoslavia and the Maghreb countries. Therefore, the Commission had to ask permission, to the representatives of the governments of the Member States meeting in the Council, to go further in this field.[50]

The first Europe Agreements were signed on 16 December 1991 with the "Visegrad" countries: Hungary, Poland and Czechoslovakia.[51] In December 1992, the Commission presented to the European Council, in Edinburgh, a report on the future of relations between the Community and Eastern European countries. In that document, the Commission stated that Member States

> "should be encouraged to apply the provisions of the Europe Agreements concerning access to employment as soon as possible, notably through the conclusion of bilateral agreements on quotas."

According to the Commission, the possibility should also be explored of accelerating the entry into force of the agreements' second stage, envisaging the improvement of conditions for access to employment.[52] It was already clear that, to a certain extent, the provisions of the agreements were insufficient.

Meanwhile, the agreement with the Czech and Slovak Federal Republic had to be negotiated again, due to the division of the country. Signature of separate agreements with the two new countries was delayed because of the division of commercial quotas of the old country. In any case, the rules on the legal status of Czechs and Slovaks in the Member States remained identical to the previous draft agreement. The agreements with the two separate countries were signed in June 1993. Meanwhile, a similar "Europe Agreement" was concluded with Romania, on 2 February 1993 and with Bulgaria, on 8 March 1993. On 1 February 1994, more than two years after being signed, the European

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[49] Or Eastern European workers to refer to workers who are nationals of countries of Central and Eastern Europe.

[50] As in others, see Bull. EC, 4-1991, point 1. 3. 5.. A good analysis of the relations between countries of Eastern Europe and the EC is made by Lavigne, Marie in "La Cee est-elle l'avenir de l'Est ? - Une coopération économique limitée", *Le Monde Diplomatique*, April 1993, p. 13.

[51] Note that, some days later, as part of their preparation to the market economy and to the Community Internal Market, these four countries concluded the "Central European Free Trade Agreement" in 21 December 1992 - in *ILM*, Vol. 34, 1995, No.1, p.3. That agreement entered into force in 1 March 1993. It is trade oriented and contains no provisions on workers of one contracting State working in the territory of another.

[52] Commission Background Report No. ISEC/B6/93, 17/2/93, point 2. c.

Association Agreements with Poland and Hungary entered into force. Precisely one year later, on 1 February 1995, the Association Agreements with Bulgaria, the Czech Republic, Romania and Slovakia entered into force. On 12 April 1995, Association Agreements were signed with the three Baltic States: Estonia, Latvia and Lithuania. Negotiations have also been initiated with Slovenia on the conclusion of a Europe Agreement.

5 - Partnership and Cooperation Agreements[53]

In 1994 and 1995 the Commission proposed the conclusion of Partnership and Cooperation Agreements [hereinafter Partnership Agreements] with several countries of the ex-Soviet Union: Russia, Ukraine, Belarus, Moldova, Kazakhstan[54] and the Kyrzyk Republic. Partnership Agreements are also planned with the three transcaucasian republics of Georgia, Armenia and Azerbaijan.[55] The agreements already drafted establish a framework for a political dialogue with the European Communities and contain provisions on trade, the status of workers, establishment of companies, cross border supply of services, payments and movement of capital, competition, approximation of laws and economic cooperation - including cooperation in the social area and, in some agreements, cooperation against illegal immigration. As in the Europe Agreements, while the Partnership Agreements do not enter into force, interim agreements with the Community, acting alone, regulate the relations with those countries.

The rules of the Partnership Agreements on workers were inspired by those of the Europe Agreements, but are less generous than in the latter and there are slight variations within the several Partnership Agreements: for instance the agreements with Kazakhstan and the Kyrzyk Republic do not contain rules on social security and only the agreement with Russia includes the members of the family of the workers among the beneficiaries of provisions on social security coordination in the Member States.

6 - Declarations

a) Declarations annexed to the Lomé Convention

In IV Lomé Convention, signed on 1989, the Declarations of annexes V and VI deal with the situation of workers who are nationals of ACP countries and live in the European Union. The first provides for the respect of the fundamental freedoms of "ACP migrant workers" in the Community and declares that ACP States will take the necessary measures to discourage the irregular immigration of their nationals to the Community. The second provides for the absence of discrimination regarding working conditions and remuneration for workers of ACP States legally employed in a Member State of the EC, as well as regarding social security contributions connected with their work (for them and

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[53] See the draft Agreements with Ukraine - COM (94) 226 final of 1/6/1994; Russia - COM (94) 257 final of 15/6/1994; Kazakhstan - COM (94) 411 final of 5/10/1994; the Kyrzyk Republic - COM (94) 412 final of 5/10/1994; Moldova - COM (94) 477 final of 3/11/1994; and Belarus - COM (95) 44 final of 22/2/1995.

[54] In June 1995 the ratification of the Partnership Agreement with Kazakhstan was stalled because of the suspension of the parliament of that country. See *Week in Europe*, 15/6/1995.

[55] Meanwhile, in the view of the Commission, Uzbekistan and Turkmenistan are unlikely to meet the political conditions for negotiating Partnership and Cooperation Agreements in the short term. See *Week in Europe*, 15/6/1995.

members of their family residing with them). ACP States undertake the same obligations towards nationals of Member States. It is unlikely that these general Declarations have any binding legal effect,[56] as Article 368 of the Convention mentions only the Protocols to the Convention to provide that they "shall form an integral part thereof.[57]

b) Joint Declaration with the Mashreq Countries

The concern of these countries for their workers in the Community, especially in times of economic crisis, lead to the "Joint Declaration Related to the principles Regulating Working and Living Conditions of Migrant Workers on the Two Regions".[58] This Declaration was made by the General Commission of the Euro-Arab dialogue when meeting on 9 to 11 of December 1978 in Damask. It is said to be a "reaffirmation of the principles which inspire their policies in this field". It is made in an interesting way. Certainly due to the fact that it is only a declaration, it concedes the migrant workers broad rights: the principle of non-discrimination is recognised in respect to working and living conditions, wages, economic and union rights, professional taxes, contributions and lodging facilities. It also provides a number of rights for the members of his or her family that reside in the country where he or she works and makes many general references for the national laws of the countries involved.

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[56] Arguing in favour of their direct effect see Guild, Elspeth in *Protecting Migrants' Rights: Application of EC Agreements with Third Countries*, op.cit., at p.24. A case discussed under the first Lomé Convention was that of Razanatsimba, Case 65/77, 1977 [ECR] 2229. There the Court of Justice ruled on the interpretation of Article 62 of that Convention. This rule established that "[a]s regards the arrangements that may be applied in matters of establishment and provisions of services, the ACP States on the one hand and the Member States on the other shall treat nationals and companies or firms of the Member States and nationals and companies or firms of the ACP States respectively on a non-discriminatory basis." The Court of Justice considered that Mr. Razanatsimba, a national of Madagascar, was not discriminated against when France denied him the right to be admitted to pupillage at the Lille Bar, while it would grant such right to nationals of other ACP States, under provisions of bilateral Agreements. The Court considered that "it is not contrary to the rule as non-discrimination laid down in Article 62 for a Member State to reserve more favourable treatment to the nationals of one ACP-State, provided that such treatment results from the provisions of an international agreement comprising reciprocal rights and advantages." See paragraph 19 of the judgment. This case is interesting, notably because the non-discriminatory rule of Article 62 of the then Lomé Convention is not unique. Article 53 of the Agreement with Tunisia, for example, provides that, in fields covered by that Agreement, there shall be no discrimination between Tunisian national, companies or firms; or between Member States, their national, companies or firms.

[57] The analysis made on the declarations annexed to the European Single Act can be recalled here, with the exception that the declarations annexed to the Lomé Convention cannot exactly be seen as meaning to interpret provisions of the Convention.

[58] Bull. EC 6-1988, point 2.4.5. See also the 23th General Report on the Activities of the European Communities, pg. 389.

C) SPECIFIC ISSUES IN AGREEMENTS' RULES

1 - Workers and their family members

a) Right to work and reside

(i) Turkey

As mentioned above, the Association Agreement with Turkey was made in view of the future accession of Turkey to the EEC. Article 12, for instance, provides that:

> "The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them".

Accordingly, Article 36 of the Additional Protocol of 1970 provided that this freedom would be "secured by progressive stages" between 1/12/1976 and 1/12/1986. This was never fully implemented.

In Demirel,[59] the Court of Justice was asked to recognise the direct effect of the above mentioned Article 12 of the Association Agreement with Turkey and Article 36 of the Additional Protocol to it, when read in conjunction with Article 7 of the Agreement. The latter was drafted in a similar manner to Article 5 of the EC Treaty and provides that:

> "The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement. They shall refrain from any measures liable to jeopardise the attainment of the objectives of this Agreement."

The Court repeated its ruling in Haegeman,[60] according to which the Court of Justice has competence to interpret the provisions of an agreement concluded by the Council according to Article 228 and 238, because the Agreement is, as far as the Community is concerned, an act of the institutions of the Community within the meaning of Article 177(1) (b) of the EC Treaty. Such provisions, after the entry into force of the agreement, form an integral part of the Community legal system, and within the framework of that system the Court has jurisdiction to give preliminary rulings concerning the interpretation of the Agreement.[61] The Court considered also that it was not excluded ab initio that the provisions of the Association Agreement with Turkey, and the Additional Protocol to it, had direct effect. In this context, the Court stated that

> "A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."[62]

After having examined Article 12 of the Agreement and Article 36 of its Protocol, the Court concluded that these provisions

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[59] Case 12/86, Demirel [1987] ECR 3719. See on the direct effect of the provisions at stake in the Demirel case, the annotation to that case by Nolte, Georg, "Freedom of movement for workers and EEC-Turkey association agreement", *CMLRev*, Vol. 25, 1988, No.2, pp.403-415, at 410-414.

[60] Case 181/73, Haegeman, [1974] ECR 449.

[61] Demirel, case quoted, paragraph 7.

[62] Idem, paragraph 14.

"(...)essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers".[63]

Below, I will come back to this case, to analyse the issue of the scope within which the Court of Justice could or should control the respect of fundamental human rights.

- workers

The rights of Turkish nationals to work and reside in the Member States are further regulated by two decisions of the Association Council, which grant them some rights of access to the labour market or of continuing participation in it. The first decision was adopted in 1976 and the other was adopted in 1980.

Decision 2/76

This decision was meant to provide the rules for a first stage of four years, towards full freedom of movement of workers. Its Article 7 establishes a standstill clause for restrictions on the access to the employment market of Turkish citizens legally resident and employed in a Member State. Furthermore, Article 5 establishes that when an offer of employment cannot be met by the employment market of the Member States, and when the Member States decide to authorise a call on workers who are third country nationals, they "shall endeavour in so doing to accord priority to Turkish workers".

Paragraph 1 of Article 2 of the decision grants concrete rights to Turkish workers. It provides that after three years of legal employment in a Member State, a Turkish worker shall be entitled to "respond to an offer of employment made (...) for the same occupation, branch of activity and region." This possibility is subject "to the priority to be given to workers of Member States of the Community" and it is required that the offer of employment has been "made under normal conditions and registered with the employment services" of the relevant State. After five years of legal employment in a Member State, "a Turkish worker shall enjoy free access in that country to any paid employment of his choice".[64] In the meantime, it is provided that:

> "Annual holidays and short absences for reasons of sickness, maternity or an accident at work shall be treated as periods of legal employment. Periods of involuntary employment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment."

Paragraph 2 of Article 2 establishes that the procedures for applying the provisions of paragraph 1 "shall be those established under national rules".[65]

Decision 1/80

On 19 September 1980, the EC-Turkey Association Council adopted Decision 1/80 and Decision 3/80. The latter concerns social security and will be dealt with below. Decision 1/80 concerns the access of Turkish workers and members of their families to the labour market of the Community Member States, and grants some educational rights to

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[63] Ibidem, paragraph 23.

[64] Article 2 (1) (b).

[65] Article 2 (2). This seems to echo the formula of the Europe Agreements, according to which the rights accorded to workers and their families are "subject to the conditions and modalities applicable in each Member State" (and "laws, conditions and modalities" in the Partnership Agreements).

Turkish children. To the extent that Decision 1/80 grants more rights or more extensive rights to Turkish nationals than does Decision 2/76, the former substitutes the latter.

The rule contained in Article 5 of decision 2/76, on priority to Turkish workers, when there is not "labour available in the employment market of the Member States", is elaborated further in Article 8 of Decision 1/80. Its first paragraph provides that, in certain circumstances, Member States "shall endeavour(...) to accord priority to Turkish workers". This priority will be accorded when a Member State authorises a call on third country national workers, in case it is not possible to meet an offer of employment in the Community "by calling on the labour available on the employment market of the Member States". This seems to constitute a priority in the recruitment of labour force residing in third countries, which contrasts with Article 8(2) apparently referring to priority within the workers residing within the Community". This Article provides that, when the "duly registered Community labour force" has not been able to fill vacant positions registered in the employment services of the Member State, these services "shall endeavour to fill" them "with Turkish workers who are registered as unemployed and legally resident in the territory of that Member State."[66]

The wording of this Article, requiring that Member States "endeavour to ...", is drafted in such a way that arguably it may not necessarily be incompatible with the Commission proposal that third country nationals residing in a Member State be given access to jobs in another Member State, when the authorities of the latter are not able to find nationals of a Member State or residents in the very host Member State ready to take them.[67]

Article 6 of Decision 1/80 opens further the access to the labour market of a Member State of Turkish workers "duly registered as belonging to the labour force of [that] Member State".[68] In this respect, Article 6 of Decision 1/80 replaces Article 2 of Decision 2/76. First, Article 6 of Decision 1/80 provides that the worker is entitled, "after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available".[69] Secondly, it is provided that, after three years of legal employment, the worker can "respond to another offer of employment, with an employer of his choice, (...) for the same occupation." As in Article 2(1)g(a) of Decision 2/76, this right is subject to "the priority to be given to workers of Member States of the Community" and it is required that the offer of employment has been "made under normal conditions and registered with the employment services" of the relevant State.[70] Finally, the requirement

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[66] Note the third recital of decision 1/80 of the EC-Turkey Association Council: "[w]hereas, in the social field, and within the framework of the international commitments of each of the Parties, the above considerations make it necessary to improve the treatment accorded to workers and members of their families(...)". A Council statement concerning this recital and Article 8 of the decision, declares that "(...) the 1954 Nordic Labour Market Agreement is an international commitment such as is mentioned in the 3rd recital to the Association Council Decision. The Council notes that Article 8 of the Decision does not affect Denmark's obligations under the Nordic Labour Agreement".

[67] See point 3.3.5. of the Commission communication on a "Medium Term Social Action Programme 1995-1997", COM (95) 134, of 12/4/1995. See also chapter 4, section A.

[68] Or "appartenant au marché régulier de l'emploi", in the French version.

[69] Article 6(1), first indent.

[70] Article 6(1), second indent.

set in Decision 2/76 of five years of legal employment to have access to "any paid employment of his choice" is reduced to four years in Decision 1/80.[71]

Article 6 of Decision 1/80 provides also that

> "Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary employment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment."[72]

Here, the novelty of Article 6 of Decision 1/80 is that the qualification of "short" applies only to absences due to periods of sickness, not also due to maternity or an accident at work, as established in Decision 2/76.

To ensure the effectiveness of the provided rights of access to the labour market, Article 10(2) of Decision 1/80 establishes that, when they are entitled to such rights, Turkish workers (duly registered as belonging to Member States labour forces) and members of their families "shall be entitled, on the same footing of Community workers, to assistance from the employment services in their search for employment"

- workers family members - Decision 1/80

In the framework of the Agreement with Turkey members of the family of Turkish workers benefit also of rights to work in a Member State. Article 13 of Decision 1/80 extends to such relatives of Turkish workers the standstill provision on access to the labour market of the Member States contained in Article 7 of Decision 2/76. Article 13 requires also that those workers and family members "be legally resident and employed" in the Member States.

Article 7 of Decision 1/80 grants specific rights of access to the labour market to "members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorised to join him". First, and subject to the priority to be given to workers of Member States, they are entitled "to respond to any offer of employment after they have been legally resident for at least three years in that Member State". Secondly, "provided they have been legally resident there for at least five years", they "shall enjoy free access to any paid employment of their choice". Thirdly, it provides that "[c]hildren of Turkish workers who have completed a course of vocational training in the host country", and "irrespective of the length of time they have been resident in that Member State", "may respond to any offer of employment there(...) provided one of their parents has been legally employed in the Member State concerned for at least three years".[73]

- ECJ's jurisprudence on Decisions 2/76 and 1/80

A number of cases have dealt with the above mentioned decisions of the EC-Turkey Association Council. The Court of Justice has repeatedly considered that such decisions are capable of having a direct effect, provided that they fulfil the general

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[71] Article 6(1), third indent.

[72] Article 6(2). Article 6(3) provides (as did Article 2(2) of Decision 2/76) that the "procedures for applying paragraphs 1 and 2 shall be those established under national rules."

[73] Second paragraph of Article 7.

conditions required for the provisions of the Agreement to have that effect.[74] Moreover, it considered that several provisions of the decisions do actually have direct effect. In the Sevince case, for example, the Court of Justice considered, against the opinion of Germany, that Articles 2(1) (b) and 7 of Decision 2/76, and Articles 6 (1) and 13 of Decision 1/80 have direct effect in the Member States.[75] This was confirmed in the latter case-law of the Court.[76]

In the Eroglu case,[77] the Court interpreted the first indent of Article 6(1) of Decision 1/80, which provided that, "after one year's legal employment", the worker is entitled "to the renewal of his permit to work for the same employer, if a job is available". The Court ruled that such provision did not give

> "the right to the renewal of his permit to work for his first employer to a Turkish national who is a university graduate and who worked for more than one year for his first employer and for some ten months to another employer, having been issued with a two-year conditional residence authorisation and corresponding work permits in order to allow him to deepen his knowledge by pursuing an occupational activity or specialised practical training."[78]

The Court considered that the objective of that provision is merely to ensure continuity of employment and thus gives only the right to continue to work for the same employer after one year's legal employment.[79] Moreover, a different interpretation of that provision could also put at risk the priority enjoyed by nationals of Member States in access to work; which (according to the third indent of Article 6(1)) limits the rights of Turkish workers to access the labour market until they accomplish four years of legal employment.[80]

Meanwhile, in Sevince, the Court interpreted the concept of "legal employment" mentioned in Article 2(1) (b) in Decision 2/76 and in the third indent of Article 6 (1) in Decision 1/80. The Court considered that the legality of employment within the meaning of those provisions, does not necessarily require that the person holds a residence permit, but requires a stable and secure situation.[81] Consequently, such concept of "legal employment" does not cover the situation of a Turkish worker who was legally able to continue in employment "only by reason of the suspensive effect deriving from his appeal" on a decision refusing him the right of residence, pending a final decision by the national court thereon, and "provided always, however, that that court dismisses his appeal".[82]

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[74] See, e.g., case 192/89, S. Z. Sevince V. Staatssecretaris van Justitie [1990] ECR 3461, paragraph 15.
[75] Sevince, case quoted, paragraph 26.
[76] See, e.g., that in Kus the first and third indents of Article 6(1) were considered to have direct effect to obtain the renewal of a work permit and of a residence permit (Case C-237/91, Kus v. Landeshauptstadt Wiesbaden [1992] ECR I - 6781, paragraph 36) and that in Eroglu the Court reaffirmed that Article 7 of Decision 1/80 has direct effect (Case C-355/93, Eroglu v. Land Baden-Württemberg [1994] ECR I - 5113, paragraph 23).
[77] Eroglu, case quoted.
[78] Idem, paragraph 15.
[79] Ibidem, paragraph 13.
[80] Ibidem, paragraph 14.
[81] Sevince, case quoted, paragraph 30.
[82] Sevince, case quoted, paragraphs 32 and 33.

Similarly, in case Kus[83] the Court considered that the notion of legal employment used in the third indent of Article 6(1) of Decision 1/80 (legal employment during four years) was not fulfilled if the worker exercised an employment benefiting from a provisional right of residence, which had been granted to him while he was waiting for a definitive decision on his definitive right of residence.[84]

On the other hand, the Court considered, also in Kus, that the requirement of one year of legal employment inscribed in the first indent of Article 6(1) was fulfilled by a Turkish national who worked for one year under a residence permit which was not issued for him to work in a Member State. In the case, Mr. Kus, a Turkish national, had obtained a residence permit to live in Germany with his German wife, and the divorce of the couple had already been decreed when a decision on request for the renew of his work permit was taken.[85] The Court ruled that the right to renew a work permit, after the period required by the said provision, does not imply that the worker in question has to have simultaneously an independent right to reside in the Member State concerned. The important fact is that the worker was residing legally in the Member State for a long enough time to renew his work permit. From there on, the first indent of Article 6(1) entitles him to reside in the country to enjoy his right to work.

This connection between the right to work and the right to reside was addressed by the Court of Justice in a number of cases, starting with the Sevince. There, the Court recognised that employment and residence are two closely linked aspects of the personal situation of a Turkish worker. Thus, to grant a worker a right to have access to any kind of job of his choice (after a certain period) implies necessarily the right of the worker to have recognised a right of residence, otherwise the right to work recognised to him, or her, would be deprived of practical effect.[86] The governments of Germany and Netherlands, had argued, on the contrary, that a legal employment and the right of access to work, in the sense of the decisions, could only exists if previously a right of residence had been granted.

Reaffirming the necessary relation between the right to work and the right of residence, the Court decided in Kus that the first and third indents of Article 6(1) of Decision 1/80 have direct effect for the purposes of renewing the work permit and the residence permit of the same Turkish worker.[87] Likewise, in the Eroglu case, the Court ruled that a Turkish national who fulfils the conditions of Article 7 of Decision 1/80 can

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[83] Kus, case quoted. See also case Re a Turkish Drugs Peddler (Administrative Court of Appeal, North Rhine-Westphalia) *CMLR*, Vol.68, 1993, No.3, pp.276-280, and the case now pending before the Court, case C-285/95 Suat Kol v. Land Berlin, in which the Court of Justice was asked for a preliminary ruling on the interpretation of Article 6(1) of the decision, as far as the notion of regular employment is concerned, in a case of an expulsion related to a residence permit obtained on the base of knowingly made false statements constituting an infringement of German Law - see Proceedings of the Court of Justice, No.24/95, p.26.

[84] Idem, paragraph 18.

[85] Kus, case quoted, paragraphs 23 and 26.

[86] Sevince, case quoted, paragraph 29. This was repeated in case Kus as far as the first indent of that provision is concerned, paragraphs 29 and 30. See also paragraph 18 of case Eroglu, quoted supra, which repeats paragraph 29 of the ruling in Sevince on the link between the right to work and the right of residence. That repetition is also made in paragraph 28 of the judgment of the Court in case Bozkurt, quoted infra.

[87] Kus, case quoted, paragraph 36.

rely on that provision not only to respond to any offer of employment, but also to obtain the extension of his residence permit to be able to work.[88]

-ECJ's jurisprudence on rights of residence, protection of human rights and scope of EC Law

The following remarks deal with cases Demirel[89] and Bozkurt.[90] These cases regard rules on Turkish nationals included or adopted in the framework of the Association Agreement with Turkey. They are both concerned with the right of residence of Turkish nationals in a Member State. More importantly, they both raise the issue of the control of respect of fundamental human rights by the Court of Justice and the scope of Community Law for that purpose.[91]

- DEMIREL

Facts

In case Demirel the facts[92] were the following. Mrs. Demirel contested the legality of an expulsion order from Germany, where she had gone to live with her husband, a Turkish worker legally residing there. Mr. Demirel, her husband, went to live legally in that country in September 1979. By then, the German legislation, which dated from July 1966 and January 1975, provided that, in the event of his marriage, he would have to complete three years of residence in Germany for his wife to be able to join him there. He actually married in August 1981, in Turkey, and the couple had a son. According to the German law in force at the time of the marriage, and when their son was conceived, all the family could be reunited in Germany in September 1982. However, on 30 March 1982, the German law was changed,[93] raising from three to eight years the waiting period necessary for a Turkish worker to be able to be rejoined by his family.

In March 1984, Mrs. Demirel and the couple's son entered Germany to visit Mr.Demirel, under a visitors visa only, not valid for family reunification. The visa expired in June 1984, without Mrs.Demirel having left the country, contrary to what she had promised to the authorities. By that time, she was pregnant again and later gave birth to the second child of the couple. On the grounds that she had violated her visa, in May 1985

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[88] Case Eroglu, paragraph 23. As referred to supra, in paragraph 18 the Court recalled its ruling in Sevince on the close link between the right to work and the right of residence.

[89] Demirel, case quoted supra.

[90] Case C-434/93, Ahmet Bozkurt v. Staatssecretaris van Justitie [1995] ECR I- 1475.

[91] On the Court of Justice's review of protection of human rights in the Demirel case see Weiler, Joseph "Thou Shalt Not Opress a Stranger (EX.23:9): On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique", in *Free Movement of Persons in Europe: Legal Problems and Experiences*, T.M.C. Asser Institute Colloquium on European Law, Session XXI, 1991, Schermers, H.G. et al. (eds.), Dordrecht, Martinus Nijhoof, 1993, pp.248-271, at 255-267. See also, on human rights and Community Law, the bibliography quoted in footnote 304 of chapter 4.

[92] The "rather horrible facts", as Weiler & Lockhart call them, see Weiler, J. & Lockhart, N. "Taking rights seriously' seriously: the European Court and its fundamental rights jurisprudence - part II", *CMLRev*, Vol.32, No.2., 1995, pp.579-627, at 619.

[93] It is interesting to note that, as the report of the hearing refers, the rules were changed by two consecutive ministerial circulars, which "do not have the force of law but are internal administrative instructions", point 14 of that report, case quoted, at pp.3722-3.

the authorities issued an order for her to leave the country, threatening her with expulsion if she did not leave the country of her own volition. Mrs. Demirel had pleaded that she would have difficulties to establish herself in Turkey and that she was pregnant, but the authorities stated that the public interest inherent in the expulsion took precedent. An appeal made by Mrs. Demirel to a regional administrative authority was also rejected.

Ruling on positive EC rules

As referred above,[94] Mrs. Demirel tried to argue that Article 12 of the Agreement with Turkey and Article 36 of its Protocol, read in conjunction with Article 7 of the Agreement, had direct effect. The objective was to conclude that Member States were obliged by a standstill provision in respect of family reunification of Turkish workers resident in the Community, as part of freedom of movement of workers between Member States and Turkey.[95] The Court ruled that those provisions could not have direct effect.[96]

It cannot be said that, in this respect, the Court's ruling was particularly forceful or strange. However, it has been argued that the Court could have followed another path. Guedalla[97] presents ideas in favour of an alternative decision, using arguments also based on the positive rules applicable on Turkish workers in a Member State. He recalls the above mentioned Article 37 of the Additional Protocol to the Association Agreement with Turkey. This provision establishes the principle of non discrimination on grounds of nationality, as far as working conditions and remuneration are concerned, between Turkish workers employed in the Community and workers of other Member States of the Community.[98] In Kziber the Court found the equivalent provision of the Cooperation Agreement with Morocco (Article 40) to be of direct effect.[99] Thus, it could be assumed that Article 37 of that Protocol to the Agreement with Turkey does have direct effect too. Guedalla proposes that family unity be considered relevant for "conditions of work and remuneration" of a Turkish worker employed and resident in a Member State. He argues that a "Turkish worker who is denied family unity necessarily has worse conditions of work, as one might construe the expression, than an EC national who has the option of family unity". Moreover, "equal remuneration is nevertheless of unequal value to a Turkish

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[94] See this section B, point 1- a) (i).

[95] It is noteworthy that the government of Germany sustained that such a standstill provision did not exist, invoking the very provisions of the EC Treaty.

[96] Paragraph 23.

[97] Guedalla, Vicky, op.cit., at p. 122.

[98] This principle of non-discrimination is reaffirmed in Article 10(1) of Decision 1/80 of the EC-Turkey Association Council. The beneficiaries of the latter provision are "Turkish workers duly registered as belonging to [Member State's] labour forces." It may also be relevant to note that Article 7 of Decision 2/76 establishes a standstill clause for restrictions on the access to the employment market of Turkish citizens legally resident and employed in a Member State. Article 13 of Decision 1/80 extends that standstill provision to relatives of Turkish workers, when those workers and their family members are "legally resident and employed" in the Member States. Furthermore, in Sevince, for example, the Court of Justice considered that Article 7 of Decision 2/76, and Article 13 of Decision 1/80 have direct effect in the Member States (see Sevince, case quoted, paragraph 26). Therefore, if restrictions on family reunification were considered indirect restrictions on access to employment, such restrictions would be incompatible with the mentioned supra provisions of the EC-Turkey Association Council, and thus prohibited under Community Law.

[99] See C-18/90, Office National de l'Emploi V. Bahia Kziber [1991] ECR I-199, paragraph 22.

worker denied family unity who must therefore maintain two households."[100] Arguably, if family unity was considered to be a part of, or to be relevant for "conditions of work and remuneration" of Mr.Demirel, then, his family could join him under equal conditions to those of other nationals of a Member State living in Germany - i.e. benefiting in practice from the provisions of Regulation 1216/68 mentioned in chapter 4.

Guedalla's reasoning is not at all absurd. It has the merit of trying to solve this problem within the positive rules of Community Law, instead of raising difficult political problems for the Court of Justice to face - like the review of national legislation as far as respect of fundamental human rights is concerned. In any case, I do not think that the Court of Justice would be prepared to treat Turkish workers as migrant nationals of a Member State, for the purposes of their family reunification. That seems highly unlikely to be accepted by the Court of Justice, both in the present context, and at the time when the Demirel case was decided. Admittedly, however, this too applies to the suggestions I will present below on review by the Court of Justice of fundamental human rights.

ECJ's review of human rights

At the end of its ruling, the Court of Justice addressed the issue of whether Article 8 of the European Convention on Human Rights and Fundamental Freedoms had "any bearing" on the decision of the case. The answer of the Court was negative. The Court considered that family reunification of Turkish workers legally resident in the Community was out of the scope of Community Law, because there was no Community provision on the matter. Accordingly, Member States were not implementing a provision of Community Law when they applied national legislation on family reunification.[101] Therefore, the Court did not have

> "jurisdiction to determine whether national rules such as those at issue are incompatible with the principles enshrined in Article 8 of the European Convention on Human Rights"[102]

Critique of ECJ's non-review

This denial of jurisdiction has already been sharply criticised by Weiler.[103] It seems to me to be entirely justified to criticise the Court on this part of the judgment.

The Court seems to adopt here what I would call a formal definition of the scope of Community Law. I purpose, instead, the use of a substantial criterion of definition of

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[100] Guedalla, Vicky, op.cit., at p.122.

[101] Until the present moment, there have been only two types of cases in which the Court of Justice has reviewed the respect of fundamental human rights by national legislation (or action). First, it makes such review when Member States act "for, or on behalf of the Community - as its "agent" or executive branch - or where the Member State measure is specifically required by a Community measure" - see Weiler, J. & Lockhart, N. "'Taking rights seriously' seriously: the European Court and its fundamental rights jurisprudence - part I", *CMLRev*, Vol.32, 1995, No.1, pp.51-94, at pp.63-4. Secondly, following its judgment in ERT, the Court also reviews the respect of human rights where a Member State relies on a derogation provided by EC Law in order to restrict a right protected by Community Law (namely one of the four fundamental free movement provisions). See Case C-260/89, Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis et Sotirios Kouvelas, [1991] ECR I-2925.

[102] Case Demirel, quoted supra, paragraph 28.

[103] Weiler, "Thou Shalt Not Opress a Stranger...", op.cit.

the scope of Community Law, that could be used for the purposes of review of human rights.

In Demirel, to justify its own denial of jurisdiction on the human rights problem, the Court considered sufficient the absence of a positive rule of Community Law on family reunification, which could be applied in the case. However, perhaps the question should not be limited to a determination of whether there is a positive rule of Community Law on the matter. That is certainly relevant, but not necessarily the only relevant factor in this respect. It may be that the Court of Justice, in certain circumstances, has the duty to review national legislation which has a bearing on human rights even on matters regarding which there is no positive rule of Community Law.

To assert the existence of a duty of the Court of Justice to review human rights protection, it also seems important to determine whether there is a relevant connection between the right regulated by national law (namely as far as respect of fundamental human rights is concerned) and the enjoyment of the right granted by Community Law. With this reasoning I try to find a substantial criterion to define the scope of Community Law.

In the case under analysis, it must be determined whether the respect of fundamental human rights related to the Demirel's family reunification has a relevant connection with the right of Mr.Demirel to work and to reside in a Member State, a right which is protected by Community Law.[104]

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[104] In this respect, Nolte seems to follow the same line of substantial reasoning, even if his conclusions are more limited than mine. He argues against the overriding importance of the criterion used by the Court to deny its jurisdiction: namely that there is no Community legislation on family reunion. He hypothesises a case in which Community Law would go beyond the present rules granting rights of access to the labour market, and would actually guarantee to Turkish workers the conditions of their residence status in the Member States. In such a case, he claims that a national rule regulating the modalities of family reunion would come 'within the framework' of the Community rule guaranteeing the residence status of Turkish workers. "To fall into [the framework of that Community rule] it is immaterial whether the national rule in question was expressly designed to implement a rule of Community law or whether it is simply presupposed by such rule." Nolte gives one example of such a Community rule on the residence status of Turkish workers: a rule granting to the spouse of the worker the right to live together with the latter in a Member State. In such case, "the question would arise whether minors could claim to join their parents under Community Law". He seems to believe that the right of such minors would be a Community Law subject. He sustains that it "is very doubtful whether in that case the Community could leave it to the Member States to issue rules on that matter on the basis of their fundamental human rights". He explains that "by guaranteeing the reunion of the spouses the Community assumes responsibility for the matters which are, by virtue of the right to family respect, inextricably connected with that matter. Since this right not only guarantees a sphere free of restrictions but is also a source of certain positive obligations [Nolte refers to the European Court of Human Rights judgments in Johnston, of 18 Dec. 1986, Series A No.112, p.55; and Abdulaziz et al. of 28 May 1985, Series A, No. 94, p.67] the addressee of these obligations seems to be the entity which is responsible for the legal status on the basis of which a person builds his day-to-day existence. Thus, at the moment that the Community, by virtue of a decision of the Council of Association, assumes the responsibility for residence status, it becomes the addressee of the right to respect for family life." See the annotation to the Demirel case - Nolte, Georg "Freedom of movement for workers and EEC-Turkey association agreement", *CMLRev*, Vol. 25, 1988, No.2, pp.403-415, at 414-415. Note, however, that Nolte does not goes as far as to sustain that the Court of Justice should have reviewed the human rights aspect of the Demirel case. He only recalls the insufficiency of the criterion used by the Court to deny its jurisdiction on the matter. Nevertheless, Nolte remarks point out the importance for the very Community rules of national legislation "inextricably connected with" such rules.

Naturally, it remains to be defined what the mentioned "relevant connection" is. For now, I would prefer to stress the importance of this substantial criterion and its justification. Next, I will try to define it more precisely.

First, it can be recalled that rights and legal orders are mere conceptual constructions. They provide perceptions of reality, but do not always recreate the interaction between the many different aspects of people's lives. Nevertheless, rights and legal orders are meant to serve persons in real life, not persons as legal concepts. In this respect, it may be highlighted, for example, that only a substantial criterion of definition of EC Law scope can fully take into account the obvious interaction between Community legislation and national legislation, and can take into account the results of that interaction for the enjoyment of Community rights.[105]

Secondly, this type of substantial criterion and substantial reasoning has already been used by the Court of Justice itself. In this respect, the Court's ruling in Sevince can be recalled again. In this case the Court recognised the necessary relation between, on one hand, the right to work granted by Community Law to Turkish workers and, on the other hand, their right of residence regulated by national legislation. The Court declared that employment and residence are two closely linked aspects of the personal situation of a Turkish worker. Thus, the EC right to work of a Turkish national necessarily implied his right of residence. Otherwise, in the words of the Court, his Community right to work "would be deprived of practical effect".[106] The fact that there was no positive rule of Community Law on such right of residence was no obstacle to the Court's ruling.

This is obviously not the only ruling of the Court of this kind. In other cases the Court of Justice used also a substantial reasoning to define its jurisdiction on a right regulated by national legislation and related with the enjoyment of a Community right.[107] In fact, the protection of the practical effect of a Community right is often a determinant factor in the Court's rulings, e.g. regarding judicial remedies available to beneficiaries of a EC right.

Another example is the case Konstantinidis,[108] in which was at stake the application of German rules on transliteration of Greek names for the Roman alphabet. The German rules were applied to Mr. Konstantinidis, a Greek migrant who was a self-employed professional. In the concrete case the German legislation entailed that the name of Mr. Konstantinidis be entered in a register of civil status, against his wishes, in a transliteration which seriously misrepresented the correct pronunciation of his name.

In a manner similar to what the Court stated in Demirel on family reunification, in Konstantinidis the Court recalled that the transliteration of Greek names was an area

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[105] It can be recalled that "the potential for Community legislative reach into Member State domains is not only dynamic but may, perhaps be limitless." Weiler & Lockhart, op.cit., Part I, at p. 64.

[106] Sevince, case quoted, paragraph 29. As mentioned supra, this consideration was later repeated in cases Kus, Eroglu and Bozkurt.

[107] Although the Court has also used formal criteria on several occasions. For a critic of a formal reasoning of the Court in paragraph 26 of the Bostock case (case 2/92, The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock, [1994] ECR I-955) see Weiler & Lockhart, op.cit., Part II, at pp. 615-7.

[108] Case C-168/91, Christos Konstantinidis [1993] ECR I-1191.

which was for each Member State to regulate.[109] However, unlike what the Court did in Demirel, in Konstantinidis the Court went beyond this assertion and decided that German rules on the matter could be considered incompatible with Article 52 of the EC Treaty,

> "dans la mesure où leur application crée pour un ressortissant hellénique une gêne telle qu'elle porte, en fait, atteinte au libre exercise du droit d'établissement que cet article lui garanti.[110]

The Court considered that such would be the case,

> "(...) si la législation de l'État d'établissement oblige un ressortissant hellénique à utiliser, dans l'exercise de sa profession, une graphie de son nom résultant de la translitération dans les registres de l'état civil, si cette déformation l'expose au risque d'une confusion de personnes auprés de sa clientelle potentielle."[111]

In this way the Court used a substantial reasoning to define the scope of Community Law. If the national legislation undermines ("porte atteinte") the exercise of a profession, that exercise being protected by a Community right, then the national legislation is incompatible with Community Law. Thus, implicitly but clearly, that national legislation is within the scope of Community Law. Admittedly, the Court did not mention the issue of human rights, and, actually referred to the possible existence of indirect discrimination.[112] However, the point here is that the Court was prepared to review national legislation in a matter on which there was no positive rule of Community Law. In my view the Court was also committed to a substantial reasoning and rightly so.

In any case, the substantial criterion of the Court in the cases referred to is a substantial criterion of a narrow character. The Court of Justice considers that it has jurisdiction to review national legislation when the latter deprives of effect or undermines the very Community right.

A substantial criterion of a wider scope was proposed by the Advocate General F.G. Jacobs in the same case. He proposed that the application of the German legislation to the case of Mr. Konstantinidis be considered incompatible with Articles 7 and 52 of EC Treaty. However, according to A.G. Jacobs, the determination of violation of the EC Treaty in the case did not necessarily depend on the existence of indirect discrimination[113] on grounds of nationality, which resulted in actual damage of a tangible nature,[114] which

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[109] Idem, paragraph 14 of the judgment.

[110] Ibidem, paragraph 15.

[111] Ibidem, paragraph 16.

[112] Paragraphs 12 and 13 of the judgment.

[113] It is noteworthy the example given by Advocate General F.G. Jacobs of a Member State that introduces a "draconian penal code under which theft is punishable by amputation of the right hand." This would be a national measure of a non-discriminatory nature. However, according to Jacobs, if it was applied to a migrant national of another Member State (or, in my view, also if it was applied to a third country migrant worker whose right of residence is protected by Community Law) it would be contrary to Community Law, because it would be incompatible to Article 3 of the European Convention of Human Rights - paragraph 45 of his opinion in the case. Would it make sense to apply to this hypothetical case the criteria of the Court in Konstantinidis and consider the national measure only contrary to Community Law if the migrant worker was, for example, a typist, but not if he did not need his or her right hand to work?

[114] Paragraphs 22 and 24 of A.G. Jacobs's opinion.

would be a criterion similar to that of the Court. In the view of A.G. Jacobs, the German legislation violated the EC Treaty simply because it violated Mr.Konstantinidis' human rights.

Jacobs recalls that Community Law does not regard the migrant worker purely as an economic agent and a factor of production but as a human being.[115] He sustains that

> " (...) a Community national who goes to another Member State as a worker or self-employed person under [the EC Treaty provisions] is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention of Human Rights."[116]

Weiler sustained an idea similar to this one, in relation to Turkish nationals benefiting from rights granted in framework of the Association Agreement with Turkey. He argued that

> "whatever protection [the Association Agreements with Turkey] gave migrant workers under specific disposition, there is an implicit prohibition on the parties to violate the fundamental human rights of migrant workers covered by the Agreement.[117]

Therefore,

> " (...) even in the absence of positive Community law defining with precision many of the conditions of sojourn of migrants from Turkey, (...) the European Court of Justice retains jurisdiction (and a duty) to ensure that the fundamental rights of such migrants, in relation to their rights of residence, should not be violated either by the Community or by its Member States."[118]

I agree completely with Weiler's assertion. I am certainly aware that this extension of revision of fundamental human rights by the Court of Justice can create some practical[119] and political problems.[120] Moreover, the issue of review of human rights in

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[115] Idem, paragraph 24.

[116] Ibidem, paragraph 46. See also his article "European Community Law and the European Convention of Human Rights", in *Institutional Dynamics of European Integration - Essays in Honour of Henry G. Schermers*, by Curtin, Deirdre & Heukles, Ton (eds.), Vol. II, Dordrecht, Martinus Nijhoff, 1994, pp. 561-571, at pp. 564-565.

[117] Weiler, "Thou Shalt Not Opress a Stranger...", op.cit., at p.265.

[118] Idem, at p.262. See also Weiler & Lockhart, who sustain that "the migrant worker may expect human rights protection from the Court in all that concerns his or her actual right to be in the host Member State since that right, in and of itself, is a matter of Community law. (...) But it might be excessive to expect the canopy of Community human rights protection to extend to them where they are not acting as, or treated as, migrant workers." See Weiler & Lockhart, op.cit., Part I, at pp.66-67.

[119] For a dismissal of the relevance of one these problems - an eventual overlap of jurisdiction between the Court of Justice of the European Communities and the European Court of Human Rights - see paragraph 50 of A.G. Jacobs opinion in Konstantinidis.

[120] It may be feared, e.g., the materialisation of a development similar to that of the United States, where "the federal bill of rights originally was understood to apply only to measures of the federal government", while, "[o]ver the years the Supreme Court, interpreting the 14th Amendment, has construed it to apply, by and large, to all state measures as well" - Weiler & Lockhart, op.cit., Part I, at p.62. See also Clapham,

Community Law is related with issues of a more structural and problematic nature which are still to be completely and clearly defined - like the precise relation between national legal orders, the Community legal order and the E.C.H.R., as well as the relation between their respective jurisdictions.

However, the point remains that the Court of Justice should not refuse jurisdiction on the respect of human rights of Turkish workers whose right of residence in a Member State is protected by Community Law. Arguably, it is a normal consequence of the right of residence of those workers (which is entailed by the right to work) that their fundamental human rights are protected. It can be sustained that the free exercise by a Turkish worker of his or her Community right to work and reside in a Member State is undermined by the violation in that State of his or her fundamental human rights. Moreover, it does not seem reasonable that EC Law grants a right of work and residence, but that the same EC Law allows that the enjoyment of these rights may entail the violation of the fundamental human rights of those same beneficiaries of Community rights. This violation deprives such workers of the normal conditions for enjoyment of Community rights. Arguably, Community Law cannot be indifferent to such deprivation. This seems to be even more clear and justified if the violation of fundamental human rights is made in relation to such a consensual and low threshold as the European Convention for the Protection of Human Rights [hereinafter E.C.H.R.].

Were Demirel's human rights violated?

The above remarks concentrated on arguing that the Court should review the protection of fundamental human rights in the Demirel case. Now, I would like to argue that Demirel's fundamental human rights were actually violated in the case.

It could perhaps be sustained that the application to Mr.Demirel and his family of the German rules on family reunification violated their right to family life, protected by the E.C.H.R..

As referred to in the last chapter, according to a well established case-law of the Court of Justice "fundamental human rights form an integral part of the general principles of Community Law, the observance of which is ensured by the European Court of Justice".[121] Moreover, the Court has already considered that:

> "International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community Law" [122]

The European Convention of Human Rights being one of such treaties, the Court has often used the Convention as a standard to review the legality of acts under the scope of Community Law.[123]

A., *European Union - The Human Rights Challenge*, vol. I - *Human Rights and the European Community: A Critical Overview*, Baden-Baden, Nomos, 1991, pp.33-55, at p.45. However, a similar development does not seem to be likely in the present phase of European integration.

[121] See, for instance, Case 29/69, Stauder [1969] ECR 419; Case 4/73, Nold(II) [1974] ECR 491; Case 44/79, Hauer [1979] ECR 3727 and Case 136/79, National Panasonic [1980] ECR 2033.

[122] Second Nold case, quoted infra, paragraph 13, at p.507.

[123] See, e.g., Case 36/75, Rutili [1975] ECR 1232 and Case 63/83, Kirk, [1984] ECR 2718.

As referred to before, it has been considered by the Commission and the Court of Human Rights of Strasbourg that the right to reside or to enter a Contracting Party, as well as the right of asylum and the freedom of expulsion, are not, as such, protected by the Convention.[124] However, it has also been considered that migration measures adopted by a Contracting State may put at stake certain rights protected by the Convention. I believe that to be precisely the case here.[125]

The change of the German law on family reunification applied to Mr. Demirel five months before the date in which, according to the old law, he could bring his family to live with him. He had been waiting for that occasion, he had married and had a son. It is imaginable that the couple contracted marriage and that they had the child, hoping to be able to live all three together in Germany. It could be argued that the Demirel's right of family life was violated, in so much as they had the right to organise their family life according to the law. They had legitimate expectations[126] that the organisation of their life,[127] especially in such a fundamental matter, would not be put in jeopardy by a new law which so drastically increased the time necessary for them to live together in Germany - three to eight years.[128] In material terms I would sustain that this is a case of retroactive application of the law.[129] One that should not be allowed to exist in this situation.[130]

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[124] See, e.g., Commission decision of 24/4/1965, in Application No. 1855/63, Yearbook of the European Convention of Human Rights, Vol. VIII, p.203, and judgment of the European Court of Human Rights in Abdulaziz et al., of 28 May 1985, Series A, No. 94, p.67. See also the observations of the French government on this point in the report for the hearing of the Demirel case, ECR, quoted supra, p.3728. See also section B of chapter 1.

[125] For the analysis of violation of their right to family life I do not propose to overlook that the Demirels are foreigners in a Member State. I certainly take that fact into consideration. I simply sustain that they are entitled to the protection by EC Law of fundamental human rights in the way ensured by the E.C.H.R. to foreign persons.

[126] On the principle of legitimate expectations (and legal certainty) in Community Law see Hartley, T.C., *The Foundations of European Community Law*, 3rd ed., Oxford, Clarendon Press, 1994, at pp.149-155; Schwarze, J. , *European Administrative Law*, London, Sweet & Maxwell, 1992, at pp.942-953; and Wyatt, D. & Dashwood, A. *European Community Law*, 3rd.ed., London, Sweet & Maxwell, 1993, at pp.91-5.

[127] Note for example that Article 2 of the Grundgesetz (the German Basic Law) provides that everyone has the right to develop his personality in so far as he does not infringe the rights of others and does not act in breach of the constitutional order or of public morality.

[128] The violation of the right to family life in this manner - right to organise their family life within the limits of the law for the purposes of family reunification - would be more clearly violated, for example, if the old law required 15 years of residence of the worker, if 14 years and nine months had already passed and if a new law would extend the required period of residence, e.g. to 30 years. However, the violation of the right to family life as violation of legitimate expectations, arguably, exists also in the concrete case of the Demirels.

[129] In legal technical terms, this type of application of the law in time - when a new rule of law is applied to an act which is in process of completion - is a case of false retroactivity or quasi-retroactivity. See Hartley, op.cit., at p.149.

[130] Note that the Court of Justice held in Kirk that non-retroactivity in penal rules (in relation to Regulation 170/83) is part of the general principles of law which observance the Court of Justice ensures - case 63/83, Kirk [1984] ECR 2718, paragraph 22. The principle of non-retroactivity is often applied in the constitutional orders of the Member States as a limit to legislation restricting human rights. The idea underlying in this principle should forbid a retroactive change in law on family reunification of the kind occurred in the Demirel case.

This line of reasoning has not been adopted, and to my knowledge not even considered by the Commission or Court of Human Rights of Strasbourg. However, there is certainly room to argue that the material retroactivity of national legislation on family reunification of foreigners can violate their right to family life, in the manner construed above.

- BOZKURT

Facts and ruling of the Court

In the Bozkurt case the Court was asked to interpret certain provisions of decisions of the EC-Turkey Association Council. However, this case can also be seen in the perspective of the protection of human rights.

The case concerned a Turkish worker, Mr. Bozkurt, who was employed in a Dutch company, and had suffered an accident at work. The Dutch Ministry of Justice had refused to grant him a residence permit unrestricted in time. Mr. Bozkurt had worked from 1979 to 1988 as a lorry driver on routes to the Middle East. His contract of employment was concluded under Netherlands law with a company incorporated under Netherlands Law, which had its head office also in that country. When Mr. Bozkurt was not working, he lived in the Netherlands. He did not have a residence permit there, because, due to the particular situation of his job, the Dutch aliens law did not require him to have one. Instead, he had the required visa valid for multiple journeys, which enable him to stay in the Netherlands when he was not working.

In 1988, Mr. Bozkurt, had an accident at work, the degree of his incapacity having been determined at between 80 and 100%. Therefore, he received invalidity benefits under the relevant Dutch legislation. When he asked for a residence permit unrestricted in time, the Dutch authorities rejected the request. Mr.Bozkurt introduced an appeal to the Council of State of the Netherlands, which asked the Court for a preliminary ruling on the interpretation of Article 2 of Decision 2/76 and Article 6 of Decision 1/80 of the EC-Turkey Association Council. As mentioned above, these provisions grant to Turkish workers certain rights of access to the labour market of the Member States, while conditioning such rights to the fulfilment of some requirements.

The first question addressed by the Court was the meaning of one of the conditions of Article 6 of Decision 1/80: that the Turkish nationals belonged to the legitimate labour force of the Member States. In this respect the Court decided against the opinion sustained by the governments of Germany, Greece, Netherlands and the United Kingdom. The Court ruled that the criterion of the Lopes da Veiga Judgment[131] should be adopted in the case of Bozkurt. Accordingly, it was for the national court to decide whether an international lorry-driver like Mr.Bozkurt belongs to the said legitimate labour force of a Member State. To determine this, the national court should

> "determine whether the applicant's employment relationship retains a sufficiently close link to the territory of the Member State, and, in so doing, to take account in particular of the place where he was hired, the territory on which the paid employment was based and the applicable national legislation in the field of employment and social security."

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[131] Case 9/88 Lopes da Veiga v. Staatsecretaris van Justitie [1989] ECR 2989, paragraph 17.

As mentioned above, the concrete facts of these aspects of Mr.Bozkurt's situation seem to indicate that he was part of the labour force of the Netherlands. In any case, the Court of Justice stated that it was for the national court to determine so.

Secondly, the Court ruled on whether a Turkish worker like Mr. Bozkurt, who was not required to have a work permit or residence permit to carry out his work, could be considered to be legally employed in the Netherlands. If he could be considered so, the question was then whether he was entitled to have a right of residence while he had a legal employment. The answer of the Court was affirmative in both respects. The Court declared that the rights to work and to reside while working, which are conferred to Turkish nationals duly integrated in the labour force of a Member State, are accorded to such nationals

> "(...) irrespective of whether or not the competent authorities have issued administrative documents which, in this context, can only be declaratory of the existence of those rights and cannot constitute a condition for their existence."[132]

Thirdly, the Court addressed what, for the purposes of respect of human rights by Community Law, seems to be the most important issue in the case. The Court was asked to interpret again Article 6 of Decision 1/80 of the EC-Turkey Association Council. The question now was whether, under that provision, a Turkish worker belonging to the legitimate labour force of a Member State and having had an accident at work which rendered him permanently incapacitated for work, was entitled to remain in the territory of that Member State. If the answer to this question was positive, then for Mr.Bozkurt to have such a right to remain in the Netherlands, he needed only to be considered by the Dutch court as belonging to the legitimate Dutch labour force.

In the case, Bozkurt and the Commission invoked the second paragraph of Article 6 of Decision 1/80.[133] Mr.Bozkurt claimed that the right for him to remain in the Netherlands could be derived from the second sentence of that provision, as it refers to long absences on account of sickness, which "shall not affect rights acquired as the result of the preceding period of employment".[134] The Commission presented what seems to be a more convincing argument. It argued that his right to remain could be derived from the first sentence of the provision, because, according to the Commission, this sentence provides that

> "a period of permanent incapacity for work resulting from an accident at work must be treated in the same way as permanent legal employment, which implies the existence of a right of residence for the person concerned".[135]

On the other hand, the governments of Germany, Greece, the Netherlands and United Kingdom sustained that, in the absence of an express provision on the subject,

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[132] Case Bozkurt, quoted supra, paragraph 30.

[133] Which provides that "[a]nnual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary employment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment."

[134] Bozkurt, case quoted, paragraph 33.

[135] Idem, paragraph 34.

"Turkish workers must be regarded as not entitled to claim the right to remain." According to those governments, the consequences for the right of residence of a person with a permanent incapacity to work would be "governed exclusively by the national law of the Member State concerned".[136]

Germany and the United Kingdom added that the objective of Decision 1/80 was only to consolidate the situation of Turkish workers already employed. In their view, the right of residence "must remain" only a corollary of the worker's employment, "so that, where there is a break in employment, the right of residence can subsist only if that break is of limited duration."[137] This interpretation would, in the view of those Member States, be in conformity with Article 6 of the Decision, as this would refer "only to temporary absences, which would not as a rule affect the workers subsequent participation in working life". On the contrary,

> "in the case of long-lasting incapacity for work, the worker is no longer available as a member of the labour force at all and *there is no objectively justified reason for guaranteeing him the right of access to the labour force and an ancillary right of residence.*"[138]

The conclusion of the governments was that to maintain a right of residence when the Turkish national had a permanent incapacity for work would "amount to conferring on it an independent character, contrary to the purpose of Decision 1/80."[139]

The Court accepted the arguments of the German and United Kingdom governments, taking into account how the provisions of the Decisions of the EC-Turkey Association Council and Article 12 of the Agreement stood.[140] The Court considered that Article 6(2) of Decision 1/80 "is intended only to regulate the consequences, for the application of Article 6(1), of certain breaks in employment."[141] First, annual holidays, absences for reason of maternity or an accident at work or short periods of sickness are treated as periods of legal employment. This was so "particularly" to calculate the length of the period of legal employment required in order to acquire the right to free access to any paid employment. Secondly, in the case of periods of unemployment and long absences on account of sickness, they are not treated as periods of legal employment, and are "taken into account only in order to ensure that rights acquired by the worker as the result of preceding periods of employment are preserved." Therefore, in this respect, the Court considered that:

> "[T]he provisions of Article 6(2) ensure only the continuation of the right to employment and necessarily presuppose fitness to continue working, even if only after a temporary interruption."[142]

The conclusion of the Court was that Article 6 of Decision 1/80

> "covers the situation of Turkish workers who are working or are temporarily incapacitated for work. It does not, on the other hand, cover the situation of a Turkish worker who has definitively ceased to belong to the labour force of a

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[136] Ibidem, paragraph 35.
[137] Ibidem, paragraph 36.
[138] Ibidem, paragraph 36. Emphasis added.
[139] Ibidem.
[140] Ibidem, paragraph 37.
[141] Ibidem, paragraph 38.
[142] Ibidem.

Member State because he has, for example, reached retirement age or, as in the present case, become totally and permanently incapacitated for work.[143]

The Court added that:

"(...) in the absence of any specific provision conferring on Turkish workers a right to remain in the territory of a Member State after working there, a Turkish national's right of residence, as implicitly but necessarily guaranteed by Article 6 of Decision No 1/80 as a corollary of legal employment, ceases to exist if the person concerned becomes totally and permanently incapacitated for work."[144]

Comments on the case

The Bozkurt case is quite interesting in several regards. However, the analysis to be made here will concentrate on the problems raised by the last issue addressed by the Court. In other words: the following remarks will try to determine whether or not, under Community Law, a Turkish worker belonging to the legitimate labour force of a Member State, having worked and resided in a Member State under a Community right, but having had an accident at work which rendered him permanently incapacitated for work, is entitled to remain in the territory of that Member State after such an accident.

Let me make clear from the outset that I consider that the decision of the Court regarding the right of Mr.Bozkurt to remain in the Netherlands is a decision open to criticism. However, the following analysis will not concentrate solely on the personal aspects of this case (on Mr.Bozkurt himself), but rather focus on the general way in which the decision was formulated. This generality might lead to subsequent cases being decided using the Bozkurt case as authority. The case is thus considered principally interesting as an example of the general situation of a Turkish worker who has worked in a Member State under a Community Law right and whose right of residence is questioned when he can work no more. It is in this respect that I believe that the ruling can entail very serious repercussions and is specially worrying, namely as far as the control of respect of human rights is concerned.

The issue will be here examined under two perspectives. First, it will be analysed from the point of view of the positive rules of Community Law on the matter, namely the decisions of the EC-Turkey Association Council. Secondly, the issue will be analysed in the light of the control by the Court of Justice of respect for human rights within the scope of Community Law.

- Positive rules of Community Law

As far as positive rules of Community Law on the matter are concerned, the main criticism that can be made to the ruling of the Court is that the restrictive interpretation made of Article 6 of Decision 1/80 does not seem to be the only one possible. This is striking if one recalls the facility with which the Court adopted a ruling such as this one. The effect of such ruling is that Community Law may authorise a person to work in a Member State for an undetermined number of years, protecting his or her right to work and reside there. Then, if the person can work no more, Community Law allows that he or

[143] Ibidem, paragraph 39.
[144] Ibidem, paragraph 40.

she be expelled to his or her country of origin, without any consideration whatsoever for their personal circumstances.[145]

As previous case-law of the Court of Justice exemplifies, one of the main problems at stake in this respect is that Article 6 of Decision 1/80 is not always clear and comprehensive, leaving some loopholes in the legal regime on Turkish workers in the Member States.[146] Besides the issues dealt with in this case, there remain to be interpreted expressions like, e.g., "short" and "long absences on account of sickness", used in paragraph 2 of Article 6.

The Court decided to make a restrictive interpretation of Article 6 of Decision 1/80 in relation to the right of residence of a Turkish worker, given his or her absences from work due to an accident at work. The alternative would have been to make a broad and arguably more appropriate teleological interpretation of that rule. It could be done in one of the two following ways, roughly equivalent to the suggestions of the Commission and Mr.Bozkurt, respectively. First, the fact that Mr.Bozkurt could not work could be considered as an absence for reasons of an accident at work and then be considered as a period of legal employment, according to the first phrase of Article 6(2). As the Commission pointed out,[147] if an absence for an accident at work was considered as a period of legal employment, the latter would entail the recognition of the implied right of residence. Secondly, in alternative, his incapacity to work could be considered as a period of involuntary unemployment, which would not "affect the rights acquired as the result of the preceding period of employment", in accordance with the second phrase of Article 6(2). Since previously he had already acquired the right to reside, he would continue to have such right after his accident.

There seem to be good reasons to make a teleological and broad interpretation of the provisions of the second paragraph and of the whole Article 6 of Decision 1/80. In this respect it may be noted that, contrary to what the governments of the intervening Member States repeated (explicitly and implicitly), and the Court accepted,[148] Article 6 does not seem to always require that an interruption of work be of limited duration. In fact, the first phrase of its paragraph 2 provides that:

> "Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment."

"Short" is here mentioned only in relation to periods of sickness. In this respect, it is interesting to recall again that Article 6(2) is based on Article 2(1)(c) of the former Decision 2/76 on the same matter. The latter provision stated:

> "Annual holidays and short absences for reasons of sickness, maternity or an accident at work shall be treated as periods of legal employment."

As may be seen, while in Decision 1/80, quoted above, the qualification of "short" applies only to absences due to periods of sickness, in Decision 2/76, the last one quoted, it applies also to absences due to maternity or an accident at work. There is, thus, a

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[145] To be optimistic, perhaps the decision of the Court was influenced by what could have been seen as the dubious character of the connection of Mr.Bozkurt with the Netherlands. However, that does not diminish the far-reaching consequences of the very wide formulation of the Court's ruling. Nor does it mean that Mr.Bozkurt was not entitled to more protection by the Court than the one he was given.

[146] See also Peers, Steve, "Toward Equality...", op.cit.

[147] Idem, paragraph 34.

[148] See paragraphs 36, 38 and 39, for example.

difference between the versions of the same basic rule, the more recent version (Article 6, paragraph 2 of Decision 1/80) being less restrictive. This may give food for thought. It could, perhaps, be argued that this change corresponds to an intention of the Association Council to be more "human" when it considered the legal effect of the workers' absences due to maternity or an accident at work. After the adoption of Decision 1/80, for absences due to maternity or an accident at work to be treated as periods of legal employment, they do not have to be "short absences" as before. It is certainly true that the Association Council did not go so far as to inscribe in Decision 1/80 a right of residence to persons who due, to an accident at work, could work no more. However, it does not seem either that the wording of Article 6(2) clearly precludes that possibility. Besides, as the case-law of the Court shows, the provisions of Article 6 of Decision 1/80 are not clear in many other aspects either, like in such a fundamental point as the right of residence while working.

Furthermore, there is perhaps an aspect of more general relevance in the change made by the Association Council regarding the legal effect of absences of workers due to maternity or an accident at work. If this change is a sign that a legislator such as that Council has a certain "humanity" in dealing with workers, then the strict economic view of the purpose of the legal regime of Turkish workers in the Community may be questioned. Maybe it is not necessarily correct to reason that the provisions of the Decision 1/80 only protect Turkish nationals who are working or who, although not working, will be able to work again.[149]

This can reinforce another observation, which goes as follows. If the Community legal regime protects workers in periods of temporary impossibility for work, as Article 6(2) of Decision 1/80 does, a fortiori that regime should be interpreted as protecting them if their problems are of a more serious nature - like when they have an accident at work which definitively impedes them working. This should be considered to be so at least in the lack of positive and clear rules to the contrary. Therefore, Article 6(2) should be interpreted in a broad manner, authorising a Turkish worker who suffered an accident like Mr.Bozkurt to stay in the Member State where he worked.[150]

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[149] In any case, it could even be said that an accident at work is still directly connected with the workers' work. In the case of Mr.Bozkurt the connection between his impossibility to work and his work was crystal-clear. That would not be the case of a Turkish worker who suffered a car accident with similar consequences while in holidays. The latter worker would nevertheless be entitled to protection by the Court of Justice of his or her fundamental human rights.

[150] In this respect, the Court could have used as a source of inspiration Article 2 (1) (a) of Regulation 1251/70 (OJ L 142/24 of 1/7/1970, Special Edition). Such rule provides "the right to remain permanently in the territory of a Member State [for] a worker who, having resided continuously in the territory of that State for more than two years, ceases to work there as an employed person as a result of permanent incapacity for work. If such incapacity is the result of an accident at work or an occupational disease entitling him to a pension for which an institution of that State is entirely or partially responsible, [which was the case of Mr.Bozkurt] no condition shall be imposed as to the length of residence". The Court referred that this provision "cannot simply be transposed to Turkish workers", without elaborating much on why it could not be done - see paragraph 41). In any case, what was at stake was not necessarily to transpose simply that provision, but, for example, to use it as a source of legal inspiration for a ruling which would use a broad interpretation of Article 6 of Decision 1/80, as suggested in the main text.

A final argument for such broad interpretation comes from ILO Convention No.97 concerning migrant workers,[151] which Netherlands ratified as early as 20 May 1952. Paragraph (1) of Article 8 thereof provides that:

> "(1) A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to accompany or join him shall not be returned to their country of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides."

Paragraph (2) of the same Article provides that, if a worker is admitted on a permanent basis to one country, the authorities of the latter can demand a minimum period for the application of the first paragraph. However, that period cannot exceed five years from the date of admission of the worker. As Article 234 of the EC Treaty states that rights and obligations derived from agreements concluded between Member States and third countries shall not be affected by the provisions of the EC Treaty, the above mentioned provisions of the Convention are not abrogated by the EC Agreement with Turkey.

In relation to the excluding clause referred to at the end of the quoted Article 8(1) of the Convention - that an international agreement to which the Member is a party provides for the return of the worker to his country of origin - it is submitted, again, that the relevant provisions of decision 1/80 do not actually provide for the possibility that a worker in the situation of Mr.Bozkurt be expelled.[152] In any event, Article 8(1) of the ILO Convention seems to be an additional basis to sustain that the relevant provisions of decision 1/80 of the EC-Turkey Association Council should be interpreted in a broad manner, thus protecting a Turkish worker such as Mr.Bozkurt.

Admittedly, it may not be a matter of Community Law, as such, that the mentioned ILO Convention has to be respected by the Netherlands. However, it is important to stress that, in the light of Article 234 of the EC Treaty, Community Law does not go against respect of the Convention. Arguably, in the specific case at stake, the respect by the

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[151] ILO Convention of 1 July 1949, UNTS, Vol. 120, p.71. It was ratified by 40 countries, including the following Member States: Belgium, France, Germany, Italy, Netherlands, Portugal, Spain, and the United Kingdom.

[152] Arguably, this is further confirmed by the simple fact that there is a reasonable doubt on whether the rules of the decision allow for such expulsion. Perhaps the best interpretation of the excluding clause of Article 8(1), *in fine*, of the Convention would be a narrow interpretation. This interpretation would require the existence of an explicit rule providing for the return of the worker to his country of origin, and would not be satisfied by the mere fact that such return is implicitly allowed for, after a careful judicial interpretation of the rule and the framework in which it is contained. The objective of Article 8(1) of the Convention seems to be to protect workers against unexpected events. Arguably, for the workers to be protected in that respect they should, at least, have the clear possibility to know in advance that their return to the country of origin is possible under an international agreement - in the case where the worker "is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry". Such clear possibility does not seem to exist if the rule of such an international agreement is not explicit and unequivocal enough for them to apprehend it in advance.

Netherlands of the standards of the ILO Convention No. 97 would not be compatible with the expulsion of a worker such as Mr.Bozkurt.[153]

- Protection of human rights

The ruling of the Court in Bozkurt can also be analysed from the point of view of control of respect for human rights. To start with, it may be useful to highlight the consequences that the ruling of the Court in Bozkurt could have for the violation or lack of protection of human rights. The ruling of the Court, considers that, from the point of view of Community Law it is permissible to expel from a Member State a Turkish worker when he or she can work no more, "because he has, for example, reached retirement age or (...) become totally and permanently incapacitated for work",[154] due to an accident at work.

It would be possible to wonder if the Court would apply the same justification and concrete results to some other similar situations - situations in which Turkish workers, until then protected by Community Law, would suddenly become definitively incapacitated to work. It would be interesting to know how the Court would decide a case in which such a person would be definitively unable to work because he or she had been a victim of a car accident (in which the fault was entirely of someone else) and become quadriplegic; or because she had serious medical problems after or on the occasion of giving birth to a child; or because he or she had been the victim of a criminal attack, for example a racist attack. All these cases seem to be covered by the general formulation of paragraph 40 of the judgment.[155] In all these cases such ruling of that paragraph would entail that their expulsion would be valid under Community Law. However, the analysis to be made here will not go that far. Perhaps cases like those mentioned in the preceding paragraph would not need to reach the Court of Justice of the European Communities. Perhaps the governments of the Member States would be more compassionate regarding the situation of those persons. The question would remain on how Community Law would protect such persons, if they did need such protection. However, the Court made specific reference only to the cases of retired persons and persons incapacitated to work following an accident at work. Therefore, the following analysis will concentrate on those two cases.

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[153] Note also that Article 8(1) of ILO Convention No. 143, of June 1975, establishes that, if a migrant worker is legally resident in the territory of a Contracting Party for the purposes of employment, he "shall not be considered as in an illegal situation by the mere fact that he lost his employment, which shall not in itself imply the withdrawal of his authorisation of residence". Cf. also with point 18 of Recommendation No.86 concerning migration for employment (revised) of 1949. Finally, note Article 3(3) of the European Convention on Establishment, of 1955 (ETS, No.19), to which both Turkey and Netherlands are Parties. Such provision establishes that "nationals of any Contracting Party lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security", or due to reasons related to their offence against *ordre public* or morality, if those reasons "are of a particularly serious nature".

[154] Bozkurt, case quoted, paragraph 39.

[155] It states that Article 6 of Decision 1/80 "covers the situation of Turkish workers who are working or are temporarily incapacitated for work. It does not, on the other hand, cover the situation of a Turkish worker who has definitively ceased to belong to the labour force of a Member State because he has, for example, reached retirement age or, as in the present case, become totally and permanently incapacitated for work.

The main criticism that can be made of the Court's ruling in this respect is that it allows for the expulsion of persons without any consideration whatsoever of their personal situation.

There is already something not ethical about protecting a person while he or she can work, while leaving that person without protection when he or she can work no more. That is precisely when that person needs more protection. Moreover, in the case of Mr.Bozkurt he is not protected anymore, he can work no more, because while he was working he had a serious accident. However, what seems worst from a moral point of view is that no consideration was given to the personal situation of Mr.Bozkurt. He simply cannot work and that is all that is important in deciding that he can be expelled. To this extent he was only considered as a factor of production and not as a human being with fundamental human rights.

The lack of consideration of his personal situation has not only moral relevance. It can also have some concrete legal relevance. In fact, his expulsion could violate an ethical minimum standard which was translated into a positive legal regime: the E.C.H.R..

It is very easy to imagine a situation in which an expulsion of a Turkish worker would actually violate the E.C.H.R., if we consider its Article 8, on respect for family life. For the sake of the discussion of this case, such an hypothetical situation would be, as far as the legal facts relevant for Community Law are concerned, similar to the one regarding which the Court of Justice cleared the expulsion.

Let us imagine that Mr.Bozkurt had been residing in the Netherlands for a considerable number of years - for instance from 1976, the date of the first Decision of the EC-Turkey Association Council granting Turkish workers with rights to continue to work and reside. In the meantime, he could have constituted a family there, having married and having had several children. Some of his children could already be working, thus being protected by Community Law. Moreover, Mr.Bozkurt could be a Kurd, his family could have been killed in the war between the Turkish army and Kurdish separatists. It could happen that he had no more relatives in Turkey, at least close ones. In this hypothetical situation it would seem plausible to consider that the expulsion of Mr.Bozkurt from the Netherlands would clearly infringe Article 8 of the E.C.H.R.. Nevertheless, the ruling of the Court denies that he would be protected by Community Law against such expulsion.

In my opinion this means that, in this respect, Community Law would be incompatible with the E.C.H.R.. This assessment is based on the assumption that matters regarding the expulsion of Mr.Bozkurt are within the scope of Community Law - in the mentioned hypothetical situation as in the real one dealt with by the Court. In fact, I would like to put forward the idea that, from a material and formal legal point of view, it cannot be said that it is simply a matter of national law that Mr.Bozkurt loses his right to reside in a Member State. It seems strange to say that the expulsion of Mr. Bozkurt is outside the scope of Community Law, simply because the relevant positive rules of Community Law do not give him the right to stay in a Member State. The relevant fact here seems to be that Community Law ensured his right to reside in a Member State and that Community

Law withdraws him that right.[156] It is Community Law that, according to the ruling of the Court, denies him such right because he can work no more.

In other words: it seems to me that it is a matter of Community Law that the Community entitles a person to reside, but under certain conditions - namely (according to the ruling of the Court) that he or she works, or is able to work after a temporary period of inactivity. The right of residence was created or protected by Community Law. It is a Community right. It is an intrinsic limit of the Community right of residence that it only exists in order that a person may work, regardless of whatever happens to him or her. If it is a limit of a Community right of residence, it is a Community Law matter.

Therefore, it is paradoxical to consider that to allow a person to work and reside is a matter of Community Law, and that, instead, to expel such person when he or she does not have that Community right any more is simply a matter of national law. It seems to me that, instead, it is a Community Law matter.

By way of conclusion, it has been argued that fundamental human rights could be violated in a case where a Turkish worker is expelled from a Member State because he or she can work no more, while before he or she had a Community right of residence there. Furthermore, that expulsion is an issue within the scope of Community Law, because it regards the withdrawal of a right of residence that Community Law granted to that worker. If there is a case in which fundamental human rights can be violated and which is within the scope of Community Law, then the Court of Justice should review the respect of fundamental human rights in that case. Unfortunately the Court of Justice failed again to do that in the Bozkurt case. Moreover, the Court adopted a ruling that gives room for such absence of review to be repeated in future similar cases. On the other hand, the Court still has some room for manoeuvre to make in the future such review of human rights, as it can always claim that the issue was not raised in the Bozkurt case.

(ii) Other Agreements

- general

The Agreements with the Maghreb countries and with Yugoslavia were clearly inspired by the provisions of the agreement concluded with Turkey, but are less comprehensive. For example: they make no reference to a future free movement of workers between the contracting parties.[157] They only provide for non discriminatory

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[156] The Bozkurt case seems to be particularly clear-cut compared with Demirel, regarding the justification of the judicial review of respect for human rights by the Court of Justice. In fact, in Bozkurt there is not a problem of a right regulated by national legislation only, which is connected with a Community right. There is a problem of the very right (of residence) granted by Community Law. Weiler & Lockhart make what, to a certain extent, seems to be a similar remark when they compare, as far as the issues of EC Law scope and protection of human rights are concerned, cases Bostock and Konstantinidis, both quoted supra. See Weiler & Lockhart, op.cit., part II, at p. 609, footnote 35.

[157] Articles 38 to 41 of the Agreement with Algeria, Articles 40 to 43 of the Agreement with Morocco, Article 39 to 42 of the Agreement with Tunisia and Article 44 to 47 of the Agreement with Yugoslavia. The references to the provisions of the various Agreements, made supra as "Article X of the Agreement with ..." will from now onwards be substituted by "on" followed by the name of the relevant third country with which the Community concluded an Agreement.

treatment of Maghreb[158] workers on the basis of nationality, and for coordination of social security systems of the Member States. They contain no provision on the right of access of Maghreb nationals (or of their families) to the labour market of the Member States.

All Europe Agreements have exactly the same provisions as regards workers,[159] with the exception of Poland. In spite of the chapter title "Movement of Workers", the Europe Agreements grant to Eastern European nationals no autonomous right of access to the Member States as workers. The main result of these agreements, as far as workers are concerned, is to improve the situation of Eastern European workers and their family members already living in a Member State.

In the Partnership Agreements the chapter on workers is more accurately entitled "labour conditions".[160] The Partnership Agreements provide only for non discriminatory treatment of workers and for the coordination of social security systems.[161] They also plan cooperation against illegal immigration.[162]

In both the Europe Agreements and the Partnership Agreements the beneficiaries will only be workers who are legally employed in the territory of a Member State and members of their family legally resident there.[163]

- workers family members

Under the Europe Agreements, while Eastern European workers are legally working in a Member State, their spouses and children have access to the labour market of that Member State. This possibility applies only if the members of their family are legally resident in the same Member State, and is again "subject to the conditions and modalities applicable in each Member State". The members of the family of seasonal workers and of workers coming under bilateral agreements cannot benefit from access to the labour market, unless otherwise provided by these agreements.[164] In respect of this group of rights, a reciprocity clause exists for working nationals of a Member State living in a Eastern European country. It functions under the same conditions as those for Eastern European workers.[165]

Maghreb Agreements and Partnership Agreements do not grant to family members of workers the right of access to the Community labour market.

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158 And Yugoslavian workers, although, due to the fact that the Agreement with Yugoslavia was suspended, from now onwards, only Maghreb workers will be explicitly referred to.

159 Article 36 to 42 on the agreement with Estonia, Articles 37 to 43 on the agreements with Hungary, Poland, Latvia and Lithuania; Articles 38 to 44 on the Czech Republic, Slovakia, Bulgaria, Romania and Slovenia.

160 Articles 23 to 27 on Russia, Articles 19 to 22 on Moldova, Ukraine, Kazakhstan and the Kyrzyk Republic, and Article 18 to 21 on Belarus.

161 With the exception on Kazakhstan and the Kyrzyk Republic.

162 Except in the case of the Agreement with Russia, see infra.

163 Partnership Agreements do not refer to family members of workers, except the one with Russia.

164 Article 36(1) second indent on Estonia; Article 37(1) second indent on Hungary and Poland, Latvia and Lithuania; and Article 38(1) second indent on the Czech Republic, Slovakia, Bulgaria, Romania and Slovenia.

165 Article 36(2) on Estonia, Article 37(2) on Hungary, Poland, Latvia and Lithuania; and Article 38(2) on the Czech Republic, Slovakia, Bulgaria, Romania and Slovenia.

definition of family members

Joint declarations made in relation to all Europe Agreements and the Partnership Agreement with Russia[166] state that the notion of children and of member of the family of the worker is defined according to the national legislation of the host country concerned. It seems that, not only may they have different definitions in different Community Member States, but they may even have a different definition when comparing that of the EC Member States to that of an Eastern European country.

Such joint declarations, or provisions with similar content, are absent in the Maghreb Agreements and in the Agreements with Turkey, or in the relevant Decisions of the EC-Turkey Association Council.[167]

b) Non discriminatory treatment

In the Association Agreement with Turkey, Article 9 provides that, within the scope of the Agreement and without prejudice to any special provisions which may be laid down by the Association Council "any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7" of the EEC Treaty - presently Article 6.1 of the EC Treaty. Article 9 of the Agreement with Turkey seems to be a good basis to sustain that, within the scope of that Agreement, rules on Turkish nationals should be interpreted in a similar manner to the interpretation of the corresponding rules of Community Law, at least if there are no other provisions clearly ruling against this idea. Later on, Article 37 of the Additional Protocol to the Association Agreement with Turkey established the principle of non discrimination on grounds of nationality, as far as working conditions and remuneration are concerned, when comparing Turkish workers employed in the Community to workers of other Member States of the Community.[168] This principle is reaffirmed in Article 10(1) of Decision 1/80 of the EC-Turkey Association Council. The beneficiaries of the latter provision are "Turkish workers duly registered as belonging to [Member States] labour forces."

The Maghreb Agreements establish also the principle that workers of the contracting parties must "be free from any discrimination based on nationality, as regards working conditions or remuneration", when compared with nationals of Member States.[169] Contrary to the Protocol with Turkey, the Maghreb Agreements have a reciprocity clause in favour of nationals of Member States working in Maghreb countries.[170]

The Europe Agreements provide that Eastern European workers, legally employed in the territory of a Member State, will be free from discrimination based on nationality, as compared to the nationals of the Member States where they are employed. The non-

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[166] The only Partnership Agreement to refer explicitly to family members of the workers.

[167] Note, in any case, that Article 1 of Decision 3/80 of the EC-Turkey Association Agreement refers provides the definition of family members is that made in Article 1 of Council Regulation 1408/71. The latter provision basically refers, in turn, to national legislation.

[168] Article 37.

[169] Articles 38 on Algeria, Article 40 on Morocco, Article 39 on Tunisia and Article 44 on Yugoslavia.

[170] Second phrase of Article 38 on Algeria, Article 40 on Morocco, Article 39 on Tunisia and Article 44 on Yugoslavia.

discrimination principle relates to working conditions, remuneration and dismissal. Dismissal is not mentioned in the Protocol with Turkey, nor in the Maghreb Agreements.

The objective of the equivalent provision of the Partnership Agreements is the same as that of the Europe Agreements, but under the Partnership Agreements it is only mentioned that the Member States "shall endeavour to ensure" such egalitarian treatment. The only exception is the agreement with Russia, in which the Member States pledge to "ensure" that treatment. The Association Council in the Partnership Agreements is meant to make recommendations in relation to the implementation of the non-discriminatory treatment of workers.[171]

Both the Europe Agreements and the Partnership Agreements state that the non-discriminatory treatment will be "subject to the conditions and modalities applicable in each Member State" ("laws, conditions and modalities" for Partnership Agreements). What this may precisely mean, and thus allow for, is not clear.

It could be argued that the non-discrimination principle on remuneration and working conditions (and also dismissal in the Europe Agreements and in the Partnership Agreement with Russia) is sufficiently clear, precise and unconditional to have direct effect. Arguably there is no significant difference between this principle (as established in the above mentioned rules) and the relevant Community internal rules on non discrimination.[172] Moreover, it has a limited extent, which is one more reason for this principle to be capable of being invoked in court by individuals. Finally, the nature and objectives of the relevant Agreements do not seem to preclude such direct effect. In Kziber,[173] the Court had the opportunity of ruling on the provision prohibiting discrimination on working conditions and remuneration in the Agreement with Morocco - Article 40 thereof. It found it to be of direct effect.[174] Thus, it seems that direct effect should also be recognised for the equivalent provisions on non-discrimination of the other agreements - excluding the Partnership Agreements, although including that with Russia.

c) Educational rights

Turkey is the only country whose nationals residing in the Community may, within the framework of an association agreement with the Community,[175] benefit of rights regarding education. Article 3 of decision 2/76 of the EC-Turkey Association Council

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[171] See Article 27 of the Agreement of the Community and its Member States with Russia, Article 22 on Ukraine, Moldova, Kazakhstan and the Kyrzyk Republic; and Article 21 on Belarus.

[172] For example: Article 48(2) of the EC Treaty (on employment, remuneration, and other conditions of work and employment), Article 3 of Regulation 1408/71 (on social security) and Article 6(1) of the EC Treaty (in general terms, "[w]ithin the scope of application of the EC Treaty").

[173] Case Kziber, quoted supra.

[174] Idem, paragraph 22.

[175] Note, however, that special programmes provide cooperation and exchange in education with third countries, inter alia, with Eastern European countries. Comett and Erasmus are among programmes providing for educational cooperation with third countries. It may also be interesting to note that, through an exchange of letters, annexed to the Agreement with Yugoslavia it was agreed to exchange views on joint action "to promote the teaching of the language and culture of the country of origin and safeguard the maintenance of links with that culture."

provides that Turkish children "residing legally with their parents in a Member State of the Community shall be granted access in that country to courses of general education." In that Article it was established that they "may also be entitled to enjoy in that country the advantages provided for in this connection under national laws". Furthermore, Article 9 of Decision 1/80 of the same Council establishes that

> "Turkish children residing legally with their parents, who are or have been legally employed in a Member State of the Community, will be admitted to courses of general education, apprenticeship and vocational training under the same educational entry qualifications as the children of nationals of the Member States. They may in that Member State be eligible to benefit from the advantages provided for under the national legislation in this area."

Peers sees the wording of this last phrase as drafted to avoid that those children ask for scholarships in their host country, because it contrasts with the corresponding Article 12 of Regulation 1612/68, which provides that children of workers nationals of a Member State shall be admitted in those courses "under the same conditions as the nationals of [the host] Member State." Instead, Article 9 of the Decision 1/80 provides only that the children "may" be eligible to advantages provided by national legislation.[176]

d) Provisions for development of workers rights and safeguarding of more favourable rules

As already mentioned, the EC-Turkey Association Council is empowered to adopt rules on the progressive free movement of workers between Member States and Turkey.[177] Moreover, the Association Council may also make recommendations for encouraging the exchange of workers.[178] Meanwhile, Article 8 of Decision 2/76 and Article 14(2) of Decision 1/80 contain a limitation clause safeguarding national legislation and bilateral agreements providing more favourable treatment to Turkish nationals, as far as rights of access to the labour market are concerned.

One of the final provisions of the Maghreb Agreements provides that the Association Council can formulate resolutions, recommendations or opinions, which it sees as desirable to attain common objectives and the smooth functioning of the agreements.[179] Moreover, through an exchange of letters, on the occasion of the conclusion of all Maghreb Agreements, Member States and each Maghreb country agreed to exchange views on Maghreb labour employed in the Community, including the examination of "the possibilities of making progress towards the attainment of equality of treatment for Community and non-Community workers and the members of their families in respect of living and working conditions, having regard to the Community provisions on force."

In the Europe Agreements, it is provided that, after a certain period, each of the Association Councils "shall examine further ways of improving the movement of

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[176] See Peers, "Toward Equality...", op.cit.

[177] Article 36 of the Additional Protocol to the Agreement with Turkey. See also Article 38 of the same Protocol.

[178] Article 40 of the Additional Protocol to the Agreement with Turkey and Article 18 of Decision 1/80.

[179] See, e.g., Article 44 of the agreement with Morocco.

workers".[180] For that purpose, that Council is supposed to take into account the economic and social situation in Eastern European countries,[181] as well as the employment situation in the Community. However, the Association Council can only make recommendations with that aim. It does not have power to adopt decisions itself. This contrasts with the Agreement with Turkey, that gives such competence to its Association Council. In the Europe Agreements it is also envisaged that the Association Council shall "examine granting other improvements including facilities of access for professional training". This will be made also "taking into account the labour market situation in the Member States and in the Community" and "in conformity with rules and procedures in force in the Member States".[182] Finally, in the Europe Agreements with Poland it is provided that:

> "The Member States will examine the possibility of granting work permits to Polish nationals already having residence permits in the Member State concerned, with the exception of those Polish nationals who have been admitted as tourists or visitors."[183]

This provision exists only in the agreement with Poland and seems to be related to Polish students living in Member States.

In the Europe Agreements provision is also made concerning bilateral agreements between Community Member State and Eastern European countries. First, it is provided that the existing facilities for access to employment for Eastern European workers established in those agreements "ought to be preserved and if possible improved". Secondly, it is provided that Member States not having, in this field, bilateral agreements with Eastern European countries "shall consider favourably" the possibility of concluding agreements similar to the referred.[184] A limitation clause applies to both of these rules: account has to be taken of "the labour market situation in the Member State" and the rules are "subject to its legislation and to the respect of the rules in force in that Member State in the area of mobility of workers".[185]

Provisions on "further ways of improving the movement of workers" do not exist in the Partnership Agreements. In the Maghreb Agreements and in the Partnership Agreements there is neither a provision safeguarding other more favourable rules (for instance included in national legislation or bilateral agreements); except, in respect of bilateral agreements, as far as coordination of social security is concerned.

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[180] Article 41 of the Agreement with Estonia, Article 42 of the Agreement with Poland, Hungary, Latvia and Lithuania; and Article 43 of the Agreements with Czech Republic, Slovakia, Bulgaria, Romania and Slovenia.

[181] And, as far as the Agreement with Poland is concerned, also the needs of that country.

[182] Ibidem, paragraph 2.

[183] Article 41(3) of the Agreement with Poland.

[184] See Article 40 on Estonia; Article 41 on Hungary, Poland, Latvia and Lithuania; and Article 42 on the Czech Republic, Slovakia, Bulgaria, Romania and Slovenia.

[185] Idem, paragraph 1.

e) Social Security

(i) Turkey

Among external agreements of the Community, again with the exception of the EEA Agreement, those rules on social security regarding Turkish workers are the most elaborated and those which grant most rights.

The Additional Protocol to the Association Agreement with Turkey, of 23 November 1970,[186] prescribed that by the end of the first year after the entry into force of the Protocol, the Association Council would have adopted measures on social security "for workers of Turkish nationality moving within the Community and for their families residing in the Community."[187] These measures would include arrangements to add together periods of insurance and employment completed in individual Member States in respect of "old-age pensions, death benefits and invalidity pensions, and also as regards the provision of health services for workers and their families residing in the Community."[188] It was established that the measures to be taken by the Association Council in this domain "must ensure that family allowances are paid if a worker's family resides in the Community".[189] This is better than if the requirement was that they lived in the same Member State. Nevertheless, it still may be considered discriminatory when compared with the situation of worker nationals of a Member State moving in the Community, whose families remain in their country of origin. Naturally, the requirement that the relatives be resident in the Community encourages the arrival of more relatives, because it is worthwhile to bring the family to receive more money. Some years ago, when the German government decided to reduce family allowances given to children of Turkish workers if those children were not living in Germany, a considerable number of Turkish children left Turkey and came to live with their parents in Germany.

The Protocol provides also explicitly that the addition for social security purposes of such periods of insurance and employment completed in individual Member States,

> "shall create no obligation of the Member States to take into account periods completed in Turkey."[190]

Finally, the Protocol envisaged the authorisation of transfer to Turkey of old-age pensions, death benefits, and invalidity pensions obtained under the measures mentioned regarding coordination of social security adopted by the Association Council.[191] Furthermore, a limitation clause provided that rules in bilateral agreements would prevail if they provided more favourable arrangements for Turkish nationals.[192]

The rules of the Protocol were developed by the Association Council when, on 19 September 1990, it adopted Decision 3/80 on the application of social security of the Member States to Turkish workers and members of their families. This decision extended

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[186] Article 39.
[187] Article 39(1).
[188] Article 39 (2).
[189] Article 39 (3).
[190] Article 39 (2), in fine.
[191] Article 39 (4) .
[192] Article 39(5). See, however, Article 5 of Decision 3/80, to be analysed infra.

to Turkish workers in the Community most of the rules of Regulation (EEC) 1408/71, on application of social security schemes to employed persons and members of their families moving within the Community.[193] Article 3 of the decision provides for a general principle of non-discrimination in relation to nationals of the host State, including the right to elect members to organs of social security institutions or to participate in their nomination. Meanwhile, several rules of Decision 3/80 provided for consideration of all children and relatives residing in the Community, and, in some cases, even of those residing in Turkey.[194]

There is now before the Court of Justice a case in which this decision falls to be interpreted, as far as its direct effect is concerned, namely in regard of its Articles 12 and 13 - on invalidity, and old age and death pensions, respectively. The Court will also have to decide whether or not the reference made in Article 13 of Decision 3/80 to several provisions of Regulation (EEC) 1408/71, includes reference to the amendments made to these provisions after the adoption of the Decision.[195]

(ii) Maghreb Agreements

The Maghreb Agreements establish a general principle of non-discrimination, stating that:

> "the workers [of Maghreb countries] and members of their family living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed."[196]

This principle is less extensive than that regarding Turkey, as it does not include the election of members to organs of social security institutions.

Furthermore, the Maghreb Agreements also allow for the addition of all

> "(...) periods of insurance, employment or residence completed (...) in the various Member States (...) for the purpose of pensions and annuities in respect of old age, death and invalidity, and also for the medical care for the workers and for the members of their families resident in the Community."[197]

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[193] As mentioned in chapter 4, when this Regulation was enacted it applied only to employed persons and only later was amended to apply also to self-employed persons, following Court of Justice rulings to that effect. See also chapter 4 on Regulation 1408/71.

[194] See e.g. Articles 12, 13, 27 of the decision, and also its Article 6.

[195] Case C-277/94, Z Taflan-Met et al v. Bestuur van de Sociale Verzekeringsbank, OJ C 370/1 of 24/12/1994. This is a problem of a similar type of that the Court had to face as far as the material scope of the principle of non-discrimination in social security of the Maghreb Agreements is concerned. See infra in the main text.

[196] Article 39(1) on Algeria, Article 41(1) on Morocco, Article 40(1) on Tunisia and Article 45(1) on Yugoslavia.

[197] Articles 39(2) on Algeria, Article 41(2) on Morocco, Article 40(2) on Tunisia and Article 45(2) on Yugoslavia. This rule includes the addition of periods of residence, unlike Article 39(2) of the Additional Protocol to the Agreement with Turkey, but note that Decision 3/80 of the EC-Turkey Association Council refers to the rules of Regulation 1408/71, which includes periods of residence in the addition of periods for social security purposes.

Maghreb workers will also receive family allowances for members of their families, if the latter "are resident in the Community."[198]

Moreover, the Maghreb Agreements gave to Maghreb workers the right

> "to transfer freely to [their country of origin], at the rates applied by virtue of the laws of the debtor Member State or States, any pensions or annuities in respect of old age, death, industrial accident or occupational disease, or of invalidity resulting from industrial accident or occupational disease."[199]

It was also provided that, before the end of the first year following the entry into force of the agreements, the Cooperation Council would adopt measures to implement principles on coordination of social security provisions.[200]

The Maghreb Agreements all include a reciprocity clause for treatment as a national citizen of nationals of a Member State working in the relevant Maghreb country.[201] Furthermore, as in the Additional Protocol to the Agreement with Turkey,[202] it is provided that the rules of the Maghreb Agreements on coordination of social security do not affect more favourable rules of bilateral agreements.[203]

- ECJ jurisprudence

The provisions of the Maghreb Agreements on non-discrimination on social security were the object of a number of rulings by the Court of Justice.

In Kziber[204] the Court ruled that, contrary to the opinion of the Commission,[205] Articles 40 and 41 of the Cooperation Agreement with Morocco were capable of having direct effect - account being taken of their wording and of the objective and nature of the Agreement in which they are inscribed.[206] The fact that the Agreement with Morocco did not envisage accession of that country to the Community was not considered by the Court to be an obstacle to such direct effect.[207] In Krid[208] the Court recognised also direct effect to Article 39(1) of the Agreements with Algeria, providing non-discrimination on social

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198 Articles 39(3) on Algeria, Article 41(3) on Morocco, Article 40(3) on Tunisia and Article 45(3) on Yugoslavia.

199 Articles 39(4) on Algeria, Article 41(4) on Morocco, Article 40(4) on Tunisia and Article 45(4) on Yugoslavia.

200 Articles 40 on Algeria, Article 42 on Morocco, Article 41 on Tunisia and Article 46 on Yugoslavia.

201 Articles 39(5) on Algeria, Article 41(5) on Morocco, Article 40(5) on Tunisia and Article 45(5) on Yugoslavia.

202 Article 39(5) of the Protocol. However, see also Article 5 of Decision 3/80 of the EC-Turkey Association Council.

203 Articles 41 on Algeria, Article 43 on Morocco, Article 42 on Tunisia and Article 47 on Yugoslavia.

204 See C-18/90, Office National de l'Emploi V. Bahia Kziber [1991] ECR I-199.

205 See, incidentally, the written answer of Commissioner M.Marin, given on 17/6/1987, to a member of the European Parliament, in which direct effect of such provisions was implicitly, although clearly, excluded - OJ C 261/49, of 30/9/1987.

206 Idem, paragraphs 22 and 23. This was confirmed in Yousfi in relation to Article 41 - Case C-58/93, Yousfi v. Belgium, [1994] ECR I - 1352, paragraph 18.

207 Ibidem, paragraph 21.

208 Case C-103/94, Zoulida Krid v. CNAVTS, [1995] ECR I-719.

security, because it was drafted in the same manner as Article 41(1) of the Agreement with Morocco and both agreements pursued the same objective.[209]

The personal scope of the principle of non-discrimination in social security was defined by the Court in the Kziber, Yousfi and Krid cases.

In Kziber the Court ruled, against the opinion of Germany, that the notion of worker, used in Article 41(1) of the Agreement with Morocco, is not limited to active workers. It includes also workers who have left the labour market after reaching the age required for receipt of an old-age pension, or after becoming victims of the materialisation of one of the risks conferring entitlement to allowances under other social security branches.[210] To justify its ruling the Court recalled that Article 41(2) and (4) make explicit reference, as far as addition and transfer of allocations to Morocco is concerned, to old age, death and invalidity regimes benefiting retired workers.[211] The Court ruled also that the principle of non-discrimination applies equally to the case of a family member of a Moroccan worker, who is living with him, and who satisfies all the conditions that are laid down by the legislation of a Member State (except that of nationality) to be entitled to an unemployment allowance awarded to young persons in search of employment ("allocation d'attente"). Such allowance cannot be refused to that person solely on the grounds that he or she is a national of Morocco.[212]

In Yousfi[213] the issue at stake was the situation of a Moroccan youngster who had been the victim of an accident at work and was dependent on his Moroccan father with whom he lived. Yousfi claimed a disability allowance for handicapped persons provided in Belgium only for Belgians, refugees, stateless persons or persons of undetermined nationality, who had been continuously resident in Belgium for five years. His request was rejected because he was Moroccan. The Court ruled confirmed its ruling in Kziber. It considered that Article 41(1) of the Agreements with Morocco covers also a Moroccan national who was incapable of working following an industrial accident suffered by him in the Member State where he has been living for more than five years and who applies for a disability allowance.[214]

Finally, in Krid, the Court interpreted the personal scope of Article 39(1), to confirm its rulings in Kziber and Yousfi; that workers, in the meaning of that Article, may include workers retired due to old-age or invalidity. Furthermore, the Court considered that the personal scope of the non-discrimination principle could also cover members of those workers' families, as paragraphs (1),(2) and (4) refer to the workers families, namely regarding the receipt of pensions in respect of death. Thus, the Court ruled that the non-discrimination principle of Article 39(1) covers also members of the family of an Algerian worker who continue after the worker's death to live in the Member State in which he is employed.[215]

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[209] Idem, paragraphs 23 and 24.
[210] Case Kziber, quoted supra, paragraph 27.
[211] Idem.
[212] Ibidem, paragraphs 28 and 29.
[213] Case C-58/93, Yousfi , quoted supra.
[214] Idem, paragraph 23.
[215] Case Krid, quoted supra, paragraphs 27 to 30.

The material scope of the principle of non-discrimination was also defined by the Court of Justice. In Kziber, the Court decided that the notion of social security of Article 41(1) of the Agreement with Morocco should be interpreted by analogy to the identical notion contained in Regulation 1408/71, on the application of social security schemes to employed persons and members of their families moving within the Community. Since Article 4 of that Regulation includes unemployment benefits in its scope, they are therefore also included in the material scope of the principle of non-discrimination on social security.[216] In this case the Court declared that Belgium could not refuse an unemployment allowance provided for the benefit of young persons in search of employment ("allocation d'attente") to a Morocco woman, only on the ground of her nationality.

In Yousfi, the Court developed its interpretation of Article 41(1) of the Agreement with Morocco. It declared that benefits for handicapped persons were included in the material scope of the principle of non-discrimination inscribed in that provision. The Court justified this once more by reference to the fact that such benefits were included in the field of Regulation 1408/71. The Court recalled its case-law[217] in which it had considered such benefits to be included in the Regulation, due to the fact that Article 4(1)(b) of that Regulation refers to "invalidity benefits".[218] Therefore, the Court considered that Article 41(1) of the Agreement with Morocco

> "precludes a Member State from refusing to grant a disability allowance provided for under its national legislation in favour of nationals residing in that State for at least five years to a Moroccan national suffering permanent incapacity for work following an industrial accident occurring in that State and who has resided on that state territory for more than five years on the ground that the person concerned is of Moroccan nationality"[219]

In Krid the Court had to consider whether the principle of non-discrimination on social security, established in Article 39(1) of the Agreement with Algeria, included a supplementary allowance provided in France by the *Fonds Nationale de Solidarité* to recipients of old-age or invalidity benefits under legislative provisions or regulations. According to French Law, this supplementary allowance is granted persons who have insufficient means of their own. The beneficiaries were only French nationals resident in France, and foreigners "where an international convention based on reciprocity has been signed".[220] Once again the Court recalled that the notion of social security must be deemed to have the same meaning as the identical term used in Regulation 1408/71. The problem was that, prior to its amendment by Regulation 1247/92, Regulation 1408/71 did not specifically mention non-contributory benefits, of a similar kind to the supplementary allowance from the FNS, amongst the social security benefits to which it applies. However, even before Regulation 1247/92, the Court had already considered that benefits

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216 Case Kziber, quoted supra, paragraphs 25 and 26.
217 See, e.g. Case 187/83 Callemeyn [1974] ECR 553, paragraph 15.
218 Case Yousfi, quoted supra, paragraphs 25 and 28.
219 Idem, paragraph 29.
220 Articles L.815-2 to L.815-6 of Title I, Section 5, Book VIII of the French Social Security Code.

such as that allowance fell within the matters covered by Regulation 1408/71 by virtue of its Article 4(1).[221] The Court based its decision on the fact that such type of allowance provides additional income for the recipients of social security benefits, without any assessment of individual needs or circumstances. Thus it could not be considered part of social assistance, but rather of social security. Consequently, the Court concluded that France was precluded from, on mere grounds of nationality, refusing to grant a supplementary allowance from the "Fonds Nationale de Solidarité" to Mrs. Krid, the widow of an Algerian worker, who was resident in France and was recipient of a survivor's pension from her Algerian husband who had worked in France.

(iii) Europe Agreements and Partnership Agreements

In the Europe Agreements and Partnership Agreements, as far as social security is concerned, there is not a general principle of non-discrimination based on nationality. This is in contrast to the case of Turkey and to the Maghreb Agreements.[222]

Nevertheless, in the Europe Agreements and in the Partnership Agreements (except those regarding Kazakhstan and the Kyrzyk Republic) there are also rules providing for coordination of social security systems of the Member States, in respect of workers who are nationals of the relevant third countries.[223] While the wording of the provisions of the Europe Agreements is not conditional, the Partnership Agreements merely establish that the "Parties shall conclude agreements" in order to adopt "the provisions necessary" for social security coordination. In both type of agreement the objective is the addition of all periods of insurance, employment or residence completed by workers in the various Member States. The addition is made to determine the right to receive pensions and annuities in respect of old age, invalidity and death, and for the purpose of medical care for such workers and their family members. Furthermore, any "pensions and annuities in respect of old age, death, industrial accident or occupational disease, or of invalidity resulting therefrom"[224] will be freely transferable. There is no limit regarding the country into which the transfer can be made, but it can only be made "at the rate applied by virtue of the law of the debtor Member State or States". Non-contributory benefits[225] are an exception to these rights of free transfer.

Meanwhile, in the Europe Agreements it is provided that the workers "shall receive family allowance for members of their families".[226] However, that will happen only if these relatives are legally resident in the same Member State. The condition that members of the workers family be legally resident in the Member State where the worker

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[221] See, e.g., Case 236/88 Commission v. France [1990] ECR I-3163. See also joined cases 379 to 381/85 and 93/86 Giletti [1987] ECR 955; and case 147/87 Zaoui v. Caisse régionale d'Assurance maladie de l'Ile de France [1987] ECR 5511, paragraphs 8-9.

[222] See, again, Article 3 of Decision 3/80 of the EC-Turkey Association Council and Articles 39 of the Agreement with Algeria; Article 41 on Morocco; Article 39 on Tunisia; and also Article 45 of the Agreement with Yugoslavia (not in force any more).

[223] Article 37 on Estonia, Article 38 on Hungary, Poland, Latvia and Lithuania; and Article 39 on the Czech Republic, Slovakia, Bulgaria, Romania and Slovenia. See Article 19 bis on Ukraine, Moldova, Article 18 bis on Belarus, and Article 24 on Russia, as far as the Partnership Agreements are concerned.

[224] The last type of invalidity is not included in the draft Agreement with Ukraine.

[225] In the Partnership Agreements the reference is made to "special non-contributory benefits".

[226] Partnership Agreements do not refer explicitly to family members of workers, except for that with Russia.

is employed, contrasts with the Protocol with Turkey[227] and the Maghreb Agreements,[228] which require only that they be resident in the Community.

In the Europe Agreements and Partnership Agreements, the rules on social security are also "subject to conditions and modalities applicable in each Member State" and apply only to workers legally employed there and for members of their family legally resident there. However, the Partnership Agreements, except for that with Russia, do not refer explicitly to family members of workers.

In the Europe Agreements, the Association Council has powers to adopt implementing measures on the rules of the agreements on coordination of social security.[229] It is provided that those instruments may not affect more favourable treatment established in bilateral agreements concluded between individual Community Member States and Eastern European countries.[230] In the Partnership Agreements it is not even provided explicitly that the Association Council can make recommendations for that purpose.[231] In any case, in the Partnership Agreements, it is also provided that the agreements to be concluded between the Parties on coordination of social security may not affect more favourable treatment established in bilateral agreements.[232]

Finally, it is noteworthy that a reciprocity clause is imposed on the third countries which are Parties to Europe Agreements and the relevant Partnership Agreements. It prescribes a similar treatment to workers who are nationals of a Member State and members of their families. As in relation to previous agreements, this reciprocity rule does not include the possibility of taking adding together, for social security purposes, periods of work carried out in several third countries.

2 - Establishment (and entry to work as "key personnel" of companies)

Article 13 of the Association Agreement with Turkey establishes that the Parties will be guided by the EC Treaty provisions on the right of establishment "for the purposes of abolishing restrictions on freedom of establishment between them." This provision is similar to the one related to freedom of movement of workers.[233] Both are framework

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[227] See Article 39. Note again that several rules of Decision 3/80 of the EC-Turkey Association Council provided for consideration of all children and relatives residing in the Community, and, in some cases, even of those residing in Turkey - see e.g. Articles 6, 12, 13, 27.

[228] See Articles 39 of the Agreement with Algeria; Article 41 of the Agreement with Morocco; Article 39 of the Agreement with Tunisia; and also Article 45 of the Agreement with Yugoslavia (not in force any more).

[229] Article 38 on Estonia, Article 39 on Hungary, Poland, Latvia and Lithuania; and Article 40 on the Czech Republic, Slovakia, Bulgaria, Romania and Slovenia.

[230] Article 39 on Estonia, Article 40 on Hungary, Poland, Latvia and Lithuania; and Article 41 on the Czech Republic, Slovakia, Bulgaria, Romania and Slovenia.

[231] Cf., however, (limited to coordination of social security, and on working conditions for businessmen) Article 27 on Russia, Article 22 on Ukraine, Kazakhstan, the Kyrzyk Republic and Moldova; and Article 21 on Belarus. See also Article 3 bis on Belarus, Moldova and Ukraine; and Article 3 on Russia.

[232] Concluded between individual Member States and third countries party to the Partnership Agreements. See Article 25 on Russia; Article 19 ter on Ukraine and Moldova, and Article 18 ter on Belarus.

[233] Article 12 of the Association Agreement with Turkey.

provisions and do not have direct effect. To be more precise, those Articles do not necessarily entail that the provisions of the Association Agreement with Turkey have to be interpreted as having direct effect, even if equivalent similar provisions of the EC Treaty have direct effect. Meanwhile, Article 41 of the Additional Protocol to the Agreement with Turkey contains a standstill provision on restrictions on establishment and services. The Association Council has powers to determine the timetable and rules for progressive liberalisation of the right of establishment and provision of services.[234]

The Cooperation Agreements with the Maghreb countries do not even refer to the right of establishment. As far as Tunisia is concerned, in the recent draft Association agreement with that country[235] the Commission proposes that the existing agreement be widened so as to cover the right of establishment; but, as in the Partnership Agreements, only to "one Party's firms on the territory of the other".[236] The Association Council would make recommendations to achieve this objective.

The Europe Agreements provide that the establishment of companies and natural persons (who are nationals of a Eastern European country) in Member States, as well as their operation or work therein, will be carried out with treatment no less favourable than that accorded to the companies and nationals of the host Member State.[237] Both the areas within which the right of establishment may be exercised, as well as the date after which such right may be enjoyed, differ between the various agreements and, often, even in the very same agreement, according to the sectors at stake. Yet, most of the rules on the right of establishment are common to all the agreements - notably those referring to the definition of establishment. As far as establishment of natural persons is concerned, it is defined as being

> "the right to take up and pursue economic activities as self employed persons and to set up and manage undertakings, in particular companies, which they effectively control".[238]

According to the agreements, "economic activities" include

> "activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions".[239]

In any case, self employment and business undertaking are not to be confused with access to the labour market. It will not be possible to seek or to take employment in a Member State under the provisions on establishment. Neither do the latter apply to persons who are not exclusively self employed.[240]

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234 Article 41(2) of the Protocol.
235 COM (95) 235 final, of 31/5/1995.
236 Idem, Article 31(1).
237 Articles 43 to 50 on Estonia; Articles 44 to 51 on Latvia and Lithuania; Article 44 to 54 on Hungary and Poland; Articles 45 to 55 on the Czech Republic, Slovakia, Bulgaria and Romania; and Articles 45 to 52 on Slovenia. In the draft Agreement with Slovenia reference is added to the treatment of companies and nationals of any third country, in relation to which companies of the Contracting Parties should be no less favourably treated: Article 45(1) and (2) of the draft Treaty with Slovenia.
238 Article 45(5) on Hungary and 45(4) on Poland; Article 45(4) on the Czech Republic, and 45(5) on Slovakia, Bulgaria and Romania; Article 45 on Estonia, Article 46 on Latvia and Lithuania; and Article 47. d) and f) on Slovenia.
239 Idem.
240 Ibidem.

Doubts may arise as to the legal effect and precise content of the provisions of the agreements on the right of establishment. Given its wording and the agreements objectives, it seems reasonable to admit that the core of such provisions is capable of having direct effect.[241] However, the precise personal scope of the provisions on the right of establishment seems to be less clear.[242] Do the agreements allow for a person who is an Eastern European national, residing in his or her country of origin, to come to reside in a Member State in order to work there as a self-employed person? Or do the provisions granting a right of establishment apply only to Eastern European nationals who are already living in the relevant Member State, or in some Member State?

Peers[243] favours the first interpretation, recalling that, in cases Kaefer and Procacci the Court considered "obvious" that the right of establishment and provisions of services "must require a right of entry and residence" for the persons entitled to the former rights.[244] However, what seems to be doubtful here is precisely who are the Eastern European nationals that have such right of establishment. If it was defined that Eastern European nationals living in their countries of origin do have the right of establishment in the Community, then it seems clear that they would have the right to enter and reside in a Member State. However, previously, it has to be determined that they are entitled to the right of establishment. For that specific purpose, the previously mentioned part of the Court's ruling in cases Kaefer and Procacci does not seem to help much.

Nevertheless, some other arguments can be adduced in favour of a broad interpretation. In the wording of the agreements there is no element clearly indicating that only Eastern European nationals already living in a Member State can benefit from the right of establishment. Furthermore, this right has several specific limits - both in the areas of activity in which the right can be enjoyed and in the time limits for it to be granted. Besides, there is a both underlying and express concern that the right will not be used to gain access to the employment market of a Member State. These limits and concern are very important, and are repeatedly expressed. Thus, it would seem odd that the drafters of the Treaties had forgotten to make clear the existence of a restrictive personal scope of the right, had they such scope in mind. Moreover, it may be recalled that, to facilitate the taking up and pursuance of regulated professional activities, the Europe Agreements even provide that the Association Councils will examine and take all necessary measures "to provide for the mutual recognition of qualifications."[245] This, certainly, is not a decisive argument, but it seems to indicate that a broad interpretation is possible, one that justifies the effort to be made for "mutual recognition of qualifications". A broad interpretation would appear also to make sense with regard to the generic formulation of the rule on establishment of the Europe Agreements - each Member State shall grant "a treatment no less favourable than that accorded to its own nationals for the establishment of [Eastern European] companies and nationals. Finally, a broad interpretation seems to make sense in

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241 In favour Peers, "Toward Equality...", op.cit.

242 This situation, to a certain extent, is similar to the one in the provisions on services. See infra.

243 Peers, "Toward Equality...", op.cit.

244 Joined cases C-100/89 and C-101/89, Kaefer and Procacci [1990] ECR I-467, paragraph 15. This case related to Article 176 of Council Decision 86/283 of 30 June 1986 on the association of overseas countries and territories with the European Economic Community, OJ L 175/1 of 1/7/86.

245 Article 46 on Hungary and Poland; Article 47 on the Czech Republic, Slovakia, Bulgaria and Romania; Article 49 on Estonia, Article 50 on Latvia and Lithuania; and Article 51 on Slovenia.

terms of the objective of the agreements of preparing progressively the Eastern European countries for accession to the European Union.[246]

Given a broad interpretation of the personal scope of the rules on establishment, it might be said that this would eventually entail the immigration into Member States of a considerable number of persons, most of whom would only pretend to be self-employed, without this actually being the case. However, in the final general provisions of Title IV of the Europe Agreements it is provided that nothing in the agreements can "prevent the parties from applying their laws and regulations regarding entry and stay, work, labour conditions, establishment of natural persons, and supply of services". Therefore, Member States could still use their usual instruments to avoid fraud in relation to immigration.[247]

Another possibility for the entry of Eastern European nationals to work in a Member State is as "key personnel" of companies of their countries of origin. When, under the Europe Agreements, Eastern European companies are allowed to benefit from establishment facilities, they are authorised to employ in a Member State persons who are nationals of their country.[248] However, employment of these persons is only permitted under specific conditions. Such persons have to be qualified as "key personnel", according to a strict definition made in the agreements. This, in brief, requires them to be employees with managerial functions, or to possess qualifications or knowledge which are high, uncommon or specific to the organisation in which they are employed. Moreover, such employees must have been employed by the company "for at least one year preceding the detachment". In the relevant host Member State, they can only be employed by that company and their residence and work permits cover only the period of their employment.

The Partnership Agreements do not provide for the right of establishment of natural persons, but only of companies.[249] Furthermore, some of their rules are less generous than those of the Europe Agreements: e.g., they some-times use the Most Favoured Nation clause, instead of the national treatment clause of the Europe Agreements. The Partnership Agreements also authorise the employment of key personnel of companies benefiting from the right of establishment, under conditions equal to the Europe Agreements.[250] However, the Partnership Agreements add to the definition of

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246 Note, by the way, that the Partnership and Cooperation Agreements do not grant rights of establishment to natural persons, but only to companies, see below.

247 The draft Europe Agreement with Slovenia and the Agreements with Estonia, Latvia and Lithuania contain a joint declaration according to which "the Parties agree that no provision under the Agreement can be interpreted as denying the right of the Parties to control and regulate in order to ensure that natural persons benefiting from the right of establishment effectively pursue an activity as self-employed persons."

248 Article 51 on Estonia; Article 52 on Hungary, Poland, Latvia and Lithuania; Article 53 on the Czech Republic, Slovakia, Bulgaria and Romania; and Article 46 on Slovenia. The notion of "key personnel" of companies is also used to define the persons who can enter into a Member State to provide services. See infra in the main text.

249 See Article 28 of the Agreement with Russia, Article 23 on Ukraine, Moldova, Kazakhstan and the Kyrzyk Republic, and Article 22 on Belarus. Accordingly, the Partnership Agreements do not refer to mutual recognition of qualifications.

250 See Article 32 of the Agreement with Russia, Article 28 on Ukraine, Moldova, Kazakhstan and the Kyrzyk Republic and Article 27 on Belarus.

"key personnel" made by the Europe Agreements, the category of "intra-corporate transferee".[251]

It may be noteworthy to recall here the Community internal regime on movement of third country nationals under the framework of the freedom of establishment. A national of a third country, which has concluded a Europe Agreement or a Partnership Agreement with the Community, can reside and work in a Member State, as "key personnel" of companies of their country of origin. In contrast, as already mentioned in chapter 4, if a worker of the same nationality is already residing in a Member State, no explicit Community rule grants an analogous right in a similar situation. Such third country national resident in a Member State, in the event that the enterprise for which he or she was working in that Member State decided to established itself in another Member State, cannot go to the latter and work there for the same enterprise. If this situation is considered compatible with the EC Treaty provisions on freedom of establishment,[252] then the relevant third country nationals residing in their country of origin would have, under the Europe Agreements, an advantageous position compared to their compatriots residing in a Community Member State.[253]

3 - Provision of services[254]

Article 14 of the Association Agreement with Turkey provides that the Contracting Parties will be guided by the EC Treaty provisions on services "for the purposes of abolishing restrictions on freedom to provide services between them." Like the similar rules on free movement of workers and freedom of establishment, this provision does not have direct effect. As already mentioned, the standstill rule of Article 41 of the Additional Protocol with Turkey applies also to restrictions on freedom to provide services, and the Association Council also has powers to determine the timetable and provisions for progressive liberalisation of the provision of services between the Contracting Parties.[255]

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[251] This is defined as being "a natural person working within an organisation in the territory of a Party, and being temporarily transferred in the context of pursuit of economic activities in the territory of the other Party; the organisation concerned must have its principal place of business in the territory of a Party and the transfer be to an establishment (branch, subsidiary) of that organisation, effectively pursuing like economic activities in the territory of the other Party." See the provisions quoted in the preceding footnote.

[252] See supra, chapter 4. It was argued that, in certain circumstances, such right should be understood as contained in Article 54(2)(f) of the EC Treaty. This Article requires the "progressive abolition of restrictions on freedom of establishment", namely in what relates to "the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory post in such agencies, branches or subsidiaries...". However, no secondary legislation or ruling of the Court of Justice recognised the existence of such right.

[253] See also, infra, the corresponding situation regarding services and the comments of Peers on it - Peers, "Toward Equality...", op. cit.

[254] See also infra, chapter 8 and my comments on the Council Resolution relating to the limitations on the admission of third country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons, adopted by the Council meeting of 30 November/ 1 December 1994 - Press Release: PRES/94/252 (1.12.94).

[255] Article 41(2) of the Protocol to the Agreement with Turkey.

While the Maghreb Agreements make no reference to services, the recently proposed Association Agreement with Tunisia[256] provides that the Association Council would make recommendations for "liberalisation of the provision of services by one Party's firms to consumers in the other".[257] At the out-set, each of the Parties would reaffirm its obligations under the GATS, including granting treatment according to the Most Favoured Nation clause.[258]

All Europe Agreements provide for progressive liberalisation of the "supply" of services.[259] The final objective is to allow the supply of services by companies or natural persons of Eastern European countries or of the Community Member States, who are "established in a Party other than that of the person for whom the services are intended". The movement of services is, thus, envisaged only in relation to the provider of services, not in relation to the recipient person.[260] However, this does not seem to be enough to define with accuracy the precise personal scope of the services provisions, in so far as natural persons are concerned. There is a somewhat similar problem to that mentioned in relation to the provisions of the Europe Agreements on the right of establishment. In the case of the provisions on services, the issue is whether the requirement that a beneficiary be "established" in another Party, means that a Eastern European national has to be residing in his or her country of origin, or can also be resident in a Community Member State. As Peers points out,[261] unless that expression is interpreted as including also a resident in a Member State, the Eastern European nationals living outside the Community may end up having more rights than their compatriots residing in the European Union.

While the agreement with Russia contains a general Most Favoured Nation clause for the treatment of companies supplying services, the other Partnership Agreements provide also for the progressive liberalisation of cross-border supply of services, as do the Europe Agreements. In the meantime, all Partnership Agreements envisage that the Association Council makes recommendations for that liberalisation.[262]

Under the Europe Agreements, the Association Council has power to adopt the necessary measures to implement progressively the objective of ... progressive liberalisation of supply of services.[263] Only after the adoption of such measures will the

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256 COM (95) 235 final, of 31/5/1995.
257 Idem, Article 31.
258 Ibidem, Article 32 (1).
259 Article 55 on Hungary and on Poland; Article 56 on the Czech Republic, Slovakia, Bulgaria and Romania; Article 51 on Estonia, Article 52 on Latvia and Lithuania; and Article 53 on Slovenia.
260 Probably that helps to explain why the chapter is not called free movement of services, but only "supply of services". It is noteworthy that here the drafters were more modest than in the chapter related to workers. There the title name is "movement of workers", although no major new rights to free movement are established.
261 Peers, "Toward Equality...", op. cit.
262 Article 31 on Ukraine, Moldova, Kazakhstan and the Kyrzyk Republic, and Article 28 on Belarus.
263 See Article 55(1) and (3) on Hungary and on Poland; Article 56(1) and (3) on the Czech Republic, Slovakia, Bulgaria and Romania; Article 51(1) and (3) on Estonia, Article 52 (1) and (3) on Latvia and Lithuania; and Article 53 (1) and (3) on Slovenia.

provisions of the agreement be of any use.[264] An exception to this is the provision of services for State entities, or on behalf of them - given the content of the rules of the Europe Agreements that grant, "as of the entry into force" of the agreements, Community treatment to companies of Eastern European countries in the award of public contracts.[265] This exception is not valid for the Partnership Agreements.

In step with the liberalisation process, some "temporary" movement of natural persons is allowed for by the Europe Agreements. It is limited to natural persons providing a service and to persons employed as "key personnel" by a company providing a service. The definition of "key personnel" is the one provided for by the right of establishment. The movement of natural persons may also include the movement of representatives of the company provider of services, when they seek temporary entry into a Member State to negotiate the sale of services, or to sell services for the company. However, such representatives may not make direct sales to the general public or supply the services themselves.[266]

Among the Partnership Agreements, only those with Russia and Belarus provide for the movement of natural persons for the purposes of provision of services. Such movement is only allowed for representatives of companies, under the same conditions as the Europe Agreements. Contrary to the latter, the movement of natural persons is not permitted for direct provision of services or for "key personnel" of relevant companies.[267] Furthermore, a Community declaration on the agreement with Russia and a joint declaration on the agreement with Belarus refer to the fact that the cross border supply of services envisaged by the agreement does not imply a right to movement of the service supplier or recipient into another country.

It is worthwhile comparing the rules of Europe Agreements and Partnership Agreements on movement of natural persons (nationals of third countries) to provide services, with the internal Community regime in this field, already dealt with in chapter 4. As mentioned there, in the case Rush Portuguesa,[268] France and the Commission sustained unsuccessfully, that, for the purposes of Community Law, only part of the enterprises employees could be considered providers of services. Two groups could be authorised entry into another Member State to provide services. The first group would comprise "Le personnel de confiance de la societé", the workers carrying on a task typical of company managers, able of undertaking the society vis-à-vis the other parties. The

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[264] With a different opinion see Guild, E., *Protecting Migrants' Rights: Application of EC Agreements with Third Countries*, op.cit., at pg.21.

[265] Article 66 on Hungary; Article 68 on the Czech Republic and Slovakia, Bulgaria and Romania; Article 67, in particular paragraph (2), on Poland and Estonia, Article 68, in particular paragraph (2), on Latvia and Lithuania; and Article 69, in particular paragraph (2), on Slovenia.

[266] Article 55(2) on Hungary and on Poland; Article 56(2) on the Czech Republic, Slovakia, Bulgaria and Romania; Article 51(2) on Estonia, and Article 52(2) on Latvia and Lithuania; and Article 53(2) on Slovenia.

[267] See Article 37 of the Agreement with Russia and Article 29 on Belarus.

[268] Case C-113/89, Rush Portuguesa Lda. v. Office National d'Immigration, [1990] ECR I-1417; discussed above in chapter 4.

second group would be comprised of workers who performed high skilled activities.[269] These two groups of employees correspond roughly to the type of employees mentioned in the definition of "key personnel" of a company allowed entry into a Member State, under the Europe Agreements and Partnership Agreements.[270]

4 - Common and final rules

The various agreements that have been analysed in this chapter share, in some cases, a number of rules which limit the extension or effect of the rights granted by them, or that simply provide for cooperation between the Community and its Member States and the relevant third country. The following remarks deal with some of those common rules.

a) Implementation and restriction clauses

(i) National procedures, conditions, or modalities

The decisions of the EC-Turkey Association Council, containing provisions on rights of access to the labour market, include clauses providing that procedures for applying such provisions "shall be those established under national rules."[271] In Kus,[272] the Court ruled that the direct effect of Article 6(1) of Decision 1/80 of the EC-Turkey Association Council was not put in question by a clause of that type,[273] because the latter only requires that Member States adopt administrative measures for the implementation of Article 6(1), without qualifying or restricting the application of a precise and unconditional right inscribed in it.[274]

The provisions of the Europe Agreements on non discriminatory treatment of workers, social security coordination, and rights of residence to family members state that such rights will be "subject to the conditions and modalities applicable in each Member State". Partnership Agreements refer likewise to "laws, conditions and modalities". Meanwhile, a joint declaration to all the Europe Agreements, except to the draft agreement with Slovenia, state that "the concept of 'conditions and modalities applicable in each Member State' includes Community rules where appropriate". Partnership Agreements do not have a similar declaration.

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269 As already recalled in chapter 4, this group recalls the old version of Article 16 of Regulation 1612/68, which allowed for a derogation of the principle of Community preference in the recruitment of workers. Before being amended in 1992, it provided that a worker from a third country could be hired through public employment services, provided the offer of employment was made to a "named worker and [was] of a special nature in view of: (...) the requirement of specialist qualifications" - Article 16(3)(a)(i) of the previous version of Regulation 1612/68, quoted supra. In the Annex of that Regulation (in the version of the latter previous to its amendment in 1992) it was specified that "[t]he expression 'specialist' indicates a high or uncommon qualification referring to a type of work or a trade requiring specific technical knowledge(...)."

270 With the exception of "intra-corporate transferee", included in the Partnership Agreements, but not in the Europe Agreements , or to the version of EEC Regulation 1612/68, in the version previous to 1992. See chapter 4.

271 See Article 2(2) of Decision 2/76 and Article 6(3) of Decision 1/80.

272 Case C-237/91, Kus v. Landeshauptstadt Wiesbaden [1992] ECR I - 6781.

273 That is: by Article 6(3) of Decision 1/80 of the EC-Turkey Association Council.

274 Idem, paragraph 31.

(ii) Restrictions on public grounds

As far as Turkey is concerned, there is the reference in Article 12 of the Association Agreement to the guidance of Articles 48, 49, 50 of the EC Treaty, on free movement of workers, for the interpretation of the EC-Turkey Agreement. Such reference of the Association Agreement includes also the reference to the rules of the EC Treaty, first, on restriction of rights on grounds of public policy, public security and public health, and secondly, on exclusion of employment on the public service. The first type of restriction is also valid for the reference made in Articles 13 and 14 of that Agreement to EC Treaty provisions on establishment and provision of services. In addition, these two Articles refer also to EC Treaty provisions that exclude the right of establishment and the free provisions of services from activities "connected, even occasionally, with the exercise of official authority."[275] Finally, restrictions on grounds of public policy, public security and public health are also allowed for in decisions of the EC-Turkey Association Council on the right of access to the labour market.[276]

The Maghreb Agreements do not have any of such restriction clauses.

In most of the Europe Agreements, two types of restrictions are established on the rights granted by the chapter on establishment. First, grounds of public policy, public security or public health may be invoked to limit the mentioned rights. Secondly, the provisions of the chapter do not apply to "activities which in the territory of each Party are connected, even occasionally, with the exercise of official authority".[277] Restrictions on the grounds of public policy, public security or public health may also be made on the rights to supply services under the Europe Agreements.[278]

The Partnership Agreements contain also those two types of restrictions included in the Europe Agreements.[279] Still, in the Partnership Agreements, both types of restrictions apply to all rules on establishment, services and workers and "labour conditions", while that is not the case in the Europe Agreements - except for Estonia, Latvia, Lithuania, and Slovenia.[280]

As far as restrictions on public policy, public security and public health are concerned, there seems to be grounds to sustain that they should be interpreted by analogy to the interpretation made by the Court of the equivalent provisions of the EC Treaty. This seems to be particularly justified when the rules of the external agreements at stake, granting rights to third country nationals, are considered to have direct effect.[281]

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[275] Article 55 of the EC Treaty, applied also to services due to Article 66 of the EC Treaty.

[276] Article 9 of Decision 2/76 and Article 14(1) of Decision 1/80.

[277] Article 53 on Hungary and on Poland; Article 54 on the Czech Republic, Slovakia, Bulgaria, Romania and Estonia; Article 55 on Latvia and Lithuania; and Article 56 on Slovenia.

[278] Article 57 on Hungary and on Poland; Article 58 on the Czech Republic, Slovakia, Bulgaria and Romania; Article 53 on Estonia.

[279] See Article 46 of the Agreement with Russia, Article 34 on Ukraine and Moldova, Article 35 on Kazakhstan and the Kyrzyk Republic; and Article 31 on Belarus.

[280] Article 55 on Estonia, Latvia and Lithuania; and Article 56 on Slovenia.

[281] Moreover, as Peers, ("Toward Equality...",op.cit.) recalls, when interpreting Article 36 of the EC Treaty the Court of Justice has not applied its Polydor principle, according to which the fact that the provisions of an external agreement of the Community have the same wording as the equivalent provisions of the EC Treaty does not mean necessarily that they have to be interpreted in the same manner. It may be added that, as far as Turkey is concerned, a further argument comes from the fact that,

(iii) National laws and regulations

Finally, in both Europe Agreements and Partnership Agreements there is a provision common to the chapters on workers, establishment and services. It states that nothing in the agreements can prevent the parties from applying national laws and regulations regarding entry and stay, work, labour conditions, establishment of natural persons, and supply of services. However, when applying such laws and regulations, the Contracting Parties may not "nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement".[282] The reference to "any Party" is seen by Peers as apparently precluding "direct reliance by individuals upon the clauses".[283] Meanwhile, in the Partnership Agreements, this limitation clause is further elaborated and, thus, reinforced in another provision.[284]

In the Europe Agreements with Poland, Hungary, the Czech Republic and Slovakia, an interesting declaration was made by the Community unilaterally. It states that

> "(...) nothing in the provisions of Chapter I, 'Movement of workers', shall be construed as impairing any competence of the Member States as to the entry into and stay on their territories of workers and their family members."

Given the existence in the actual text of the Agreements of the above mentioned provision with an analogous content, it may be wondered whether these declarations served not external purposes, but internal purposes regarding the clarification of the division of competences between the Member States and the Community. It could be that the Community institutions wanted to leave clear that competences "on entry into and stay on their territories of workers and their family members" belonged to the Member States and not to the Community.

(iv) Employment market disturbances

Another type of restriction is allowed for in Article 6 of Decision 2/76 and Article 13 of Decision 1/80, as far as rights of access to the labour market[285] are concerned, when "a Member State of the Community or Turkey experiences or is threatened with disturbances on its employment market(...)." This safeguard clause seems to be related to the fact that the Association Agreement with Turkey is the only one to envisage the adoption of measures on full freedom of movement of Turkish workers in the Community.

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as mentioned in the main text, Article 12 of the Association Agreement with Turkey declares that the contracting parties are to be guided by the corresponding provisions of the EC Treaty "for the purpose of progressively securing freedom of movement for workers between them." See, in the same sense, paragraph 20 of the case Bozkurt, quoted supra.

[282] Regarding the Europe Agreements see Article 58(1) on Hungary and on Poland; Article 59(1) on the Czech Republic, Slovakia, Bulgaria and Romania; Article 55 on Estonia; Article 56 on Latvia and Lithuania; and Article 57(1) on Slovenia. As far as the Partnership Agreements are concerned, see Article 48 of the Agreement with Russia, Article 35 on Ukraine and Moldova, Article 36 on Kazakhstan and the Kyrzyk Republic; and Article 32 on Belarus.

[283] See Peers, "Toward Equality...", op.cit.

[284] See Article 50 of the Agreement with Russia, Article 36d on Ukraine and Moldova, Article 41 on Kazakhstan and the Kyrzyk Republic, and Article 32e on Belarus.

[285] Established in Article 2(1) (a) and (b) of Decision 2/76 and Articles 6 and 7 of Decision 1/80.

b) Cooperation

(i) On legislation and social affairs

Through an exchange of letters, on the conclusion of all Maghreb Agreements the Member States of the Community and each Maghreb country agreed to exchange views on "social and cultural questions".

The Europe Agreements go further providing for approximation of ("existing and future") legislation of Eastern European countries to that of the Community.[286] Specific provision is made for social cooperation - including in the fields of social security, health and safety of workers, and the upgrading of job-finding, vocational training and careers-advice services.[287] In the Europe Agreements, at the end of the chapter on workers, it is established that the Community will provide for technical assistance by the Community for the establishment of "a suitable social security system.[288]

Partnership Agreements also envisage approximation of legislation with that of the Community. Moreover, social cooperation is also planned.[289] The rules on social cooperation are slightly more comprehensive and detailed than rules on social cooperation in the Europe Agreements.

(ii) Against illegal immigration

Finally, the Partnership Agreements with Russia and Kazakhstan envisage the cooperation between the Contracting parties on prevention of illegal activities - namely of "illegal immigration and illegal presence of physical persons of their nationality on their respective territories, taking into account the principle and practice of readmission".[290] Such cooperation includes mutual consultations and close coordination, covering assistance in drafting legislation for prevention of illegal activities.

Similar provisions cannot be found in the Europe Agreements, with the exception of the agreements with Slovenia,[291] Estonia,[292] Latvia,[293] and Lithuania.[294] Moreover, the agreement with Estonia is the only external agreement of the Community to make explicit reference to cooperation against "trafficking of human beings and crime related to activity of illegal immigration networks".

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[286] Article 67 on Hungary and Article 68 on Poland, Article 69 on the Czech Republic, Latvia and Lithuania, Slovakia, Bulgaria and Romania; Article 68 on Estonia; and Article 70 on Slovenia.

[287] Article 87 on Poland, Article 88 on Hungary, the Czech Republic, Slovakia, Article 89 on Bulgaria and Romania; Article 91 on Estonia, Article 92 on Latvia and Article 93 on Lithuania; and Article 89 on Slovenia.

[288] Article 42 on Estonia, Articles 43 on Hungary, Poland, Latvia and Lithuania; Articles 44 on the Czech Republic, Slovakia, Bulgaria, Romania and Slovenia. The Agreement with Hungary adds the reference to technical assistance for the establishment of "labour services system", contrary to all other Europe Agreements. In any case, when it comes to the provisions on social cooperation, the Agreement with Hungary are similar to all other Europe Agreements.

[289] See Article 74 of the Agreement with Russia, Article 63 on Ukraine; Article 57 on Moldova, Article 62 on Kazakhstan; Article 61 on the Kyrzyk Republic; and Article 52 on Belarus.

[290] See Article 84 of the Agreement with Russia and Article 71 on Kazakhstan.

[291] Article 98.

[292] Article 100.

[293] Article 101.

[294] Article 102.

Meanwhile, in the chapter on labour conditions of all Partnership Agreements, except the one with Russia, it is envisaged that the Cooperation Council will "examine which joint efforts can be made to control illegal immigration taking into account the principle and practice of readmission"[295] and shall make recommendations to that end.[296]

These are, after all, just a few concrete examples of a more general situation. As it will be explained in section C of chapter 8, the fight against illegal immigration has assumed an increasing explicit and important role within the definition of the Union external policy.

CONCLUSION

The agreements examined in this chapter constitute one of the most important areas of Community Law relevant to the legal status of third country nationals living in the European Union. The Court's rulings on these agreements have been, in most cases, rather protective of the relevant third country nationals - often going against the opinions and positions of the Member States and even of the Commission. The protection by the Court of Justice of third country nationals has been achieved, for example, through the recognition of direct effect of certain provisions of the agreements or of decisions taken under their framework. The Court has also given an appropriate interpretation of the relevant rules when it sought to defend the practical effect of the rights granted by them. Nevertheless, in other cases, the Court has not granted much protection to third country nationals - as has been pointed out in the remarks on cases Demirel and Bozkurt. It can also be said that these cases challenged the structural limitations of the Community legal order, as far as the protection of human rights is concerned. In this respect, such cases did not represent the best that Community Law can offer.

In any case, it must be emphasised that, in order to protect third country nationals in the Community, the Court could never go beyond the limits of the agreements. It seems that the ideal solution for this problem would be the adoption of a general principle of equality in the social area between resident third country nationals and nationals of Member States. It seems clear that, at least in certain domains, it is desirable to extend the rules of the agreements to all third country nationals resident in the Union. Why should, for example, a Russian national working in a Member State be able to enjoy non-discriminatory treatment in working conditions, remuneration, or contributory allowances;

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[295] See Article 20 on Ukraine, Moldova, Kazakhstan and the Kyrzyk Republic, and Article 19 on Belarus. The Agreement with Russia does not contain a like provision in the chapter on labour conditions, although, as previously mentioned, illegal immigration is included in its Article 84 as the fields in which cooperation will be developed, as mentioned in the main text. Furthermore, there is also an interesting joint declaration on Articles 26, 32 and 37 of the Agreement with Russia. It starts by declaring that the Parties to the Agreement shall ensure the issue of visas and resident permits to businessmen, key personnel of companies benefiting from the right of establishment, and to sellers of cross border services; and that they shall ensure that "administrative procedures do not nullify or impair the benefits accruing to any Party" under those Articles of the Agreement. However, the declaration proceeds by stating that the Parties agree that "an important element in this context is the timely conclusion of re-admission agreements between the Member States and Russia."

[296] See Article 22 on Ukraine, Moldova, Kazakhstan and the Kyrzyk Republic, and Article 21 on Belarus. In the declaration to the Agreement with Russia, mentioned in the preceding note, it is envisaged that the Cooperation Council "shall regularly review the evolution of the situation in these areas" - the areas referred to in the declaration.

but not his Chinese or Chilean colleagues? It is normal that the European Union grants especial rights to nationals of countries with which it keeps close relations. However, this should not exclude nationals of other third countries from enjoying a minimum threshold of rights. These latter rights could be considered to be more part of the category of fundamental human rights, universally recognisable, rather than being considered to be in the category of special social rights, which are granted only to nationals, or to foreigners but in the framework of special agreements with their countries of origin.

For a long time this type of proposal did seem quite daring. However, in its meeting of 23/11/1995, the Justice and Home Affairs Council agreed in principle to a resolution that points in this direction.[297] It provides for a special status for third country nationals who have at least ten years of legal residence in a Member State.[298] They will enjoy precisely

> "no less favourable treatment than is enjoyed, in accordance with the legislation of the Member State concerned, by nationals of that Member State with regard to working conditions, membership of trade unions, public policy in the sector of housing, social security, emergency health care and compulsory schooling".[299]

Moreover, subject to public policy and national security reasons to the contrary, those third country nationals are to be granted au unlimited residence permit or one valid for at least ten years.

At the moment of writing, the resolution was not yet formally adopted. It full text is not available and its legal nature is not certain. However, it seems to constitute a potential novelty in the approach of the European Union to the protection of basic rights of third country nationals. The rights of each of them may be seen as deserving protection due to their personal circumstances, and not only because they are nationals of a country with which the Union concluded an agreement.

Furthermore, and depending on its precise content and legal value, it may even lead to the revision of some equality rules of the external agreements studied in this chapter.

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[297] Press Release of the meeting of the Justice and Home Affairs Council of 23/11/1995, PRES/95/332.

[298] This resolution states that it will not be applicable to persons regarding which in principle there are more favourable legal regimes: like relatives of migrant nationals of Member States, migrant nationals of other EEA countries and their relatives, third counry nationals admitted to a Member State to study or research, and nationals of third countries with which the Community has concluded Agreements that provide for more favourable rules.

[299] Press Release PRES/95/332, quoted infra.

Chapter 6

EARLY INTERGOVERNMENTAL COOPERATION
(before the Treaty on European Union)

INTRODUCTION

This chapter deals with the Intergovernmental Cooperation developed before the entry into force of the Treaty on European Union.

Part I of this dissertation examined legal issues in Community Law regarding third country nationals. However, an important fact must be appreciated with regard to the harmonisation of Member States national laws, the preparation of common measures on immigration and the status of third country nationals. Most developments in these areas have occurred outside the Community framework. They have come about through what is usual referred to as "Ad Hoc Intergovernmental Cooperation", or simply "Intergovernmental Cooperation". These expressions refer to the cooperation developed by the governments of the Member States completely outside the rules and procedures of the decision-making process of the European Communities.

This chapter will first outline some legal issues concerning the work of Intergovernmental Cooperation groups, which may be classified into two general categories: those concerning the relations between the activities of the latter and EC competence, and those concerning the relations between EC Law and the rules enacted in the ad hoc intergovernmental framework. Secondly, a general overview will be made of the structure and work of the several *fora* of Intergovernmental Cooperation among governments of the Member States. Particular attention will be given to the most important intergovernmental groups, like the Trevi group, the Ad Hoc Working Group on Immigration and the Schengen Group. The work of these groups will also be assessed, both from the point of view of their efficiency, and from the perspective of the particular character of their working methods in order to determine the extent to which they can be considered democratic. The intergovernmental groups' work that is relevant for this dissertation, notably that of the Ad Hoc Group on Immigration, will be analysed in more detail in Chapter 8, together with the work already developed in the same areas under Title VI of the Treaty on European Union.

The cooperation to be examined in this chapter is that dealing with security, immigration and more generally with the creation of conditions for the abolition of internal border controls within Member States. Therefore, to a certain extent, the scope of this chapter may be wider than the scope of the overall dissertation. However, this broader analysis is intended to place the cooperation on matters related to immigration and immigrants from third countries in context. It is very important to emphasise how the concern of the Member States on third country nationals is intimately connected to their concern for the control of immigration and how both are integrated into an overall concern for general security problems. Furthermore, Intergovernmental Cooperation, whether dealing with matters concerning third country nationals (and immigration from third countries) or not, will often display similar characteristics and encounter similar problems. Relations with EC Law and EC competence, problems on working methods and the perceived lack of parliamentary or judicial control are issues which continuously arise.

The "Intergovernmental Cooperation" was developed as a way of addressing problems in which the European Communities had no competence (for example terrorism

and issues dealt with by the Trevi Group),[1] or that could not be adequately dealt with within the Community framework. This lack of adequacy could have been due to the desire of EC governments to establish co-operative structures outside the parliamentary and judicial controls of the EC. Furthermore, since unanimity was (and still is) required for action at the Community level, countries willing to cooperate had to act outside the EC framework to surmount opposition from other Member States. This was the case, for example, in the opposition of the United Kingdom to the abolition of internal border controls and the cooperation of the Schengen Group which had precisely this aim. Therefore, to some extent, this chapter gives an account of what could have been done in the framework of the European Community if there had been unanimity, or if the EC rules of decision-making were different.

The development of the Intergovernmental Cooperation may be roughly divided into four periods, discussed in section B below. The first lasted from 1976 to 1986. During this phase, the most important group was Trevi and the issues at stake were mainly related to internal security in a narrow sense. There was a broad consensus that such issues were not within EC competence and should not be dealt with by the Community.

The second period lasted from 1986 to the end of 1988. In 1986 the European Single Act entered into force and the Ad Hoc Working Group on Immigration was created. The Single European Act established in Article 7A of the EC Treaty that:

> "The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 (...) The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty. "

However, most EC governments resisted the idea that matters related to internal security, immigration and immigrants from third countries, and controls on persons at borders be treated by the Community institutions. The governments of the Member States considered that such areas were to be preserved as part of national sovereignty. They took the view that since these matters were a part of public policy and public security they could not be dealt with by EC institutions, but were more appropriately tackled within a framework of intergovernmental cooperation.[2]

As mentioned earlier, in the Final Act of the European Single Act, the EC governments made a "political declaration" on the free movement of persons stating that:

> "In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques."

In chapter 3 the legal value of this declaration was examined and it was concluded that it had no binding force in Community Law. However, this declaration expressed the will of

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[1] At least not in an obvious manner, when the cooperation began in the seventies.

[2] See the submissions of the French and United Kingdom governments in cases 281, 283-5 & 287/85, Germany et al. v. Commission, and Lanfranchi, M.-P., *Droit Communautaire et Travailleurs Migrants des États Tiers-Entrée et Circulation dans la Communauté Européenne*, Paris, Economica, 1994, pp.58-9.

the Member States to cooperate outside the Community framework and this should not be overlooked.

Also in 1986, in order to address the problems created by the new objective of abolishing internal border controls, the EC governments created the Ad Hoc Working Group on Immigration, which undertook or was deeply involved in the preparation of most common measures and documents relating to the harmonisation of laws in the field of immigration and asylum.

The third period of Intergovernmental Cooperation began in 1988-1989, these years marking the beginning of a kind of transitional phase from complete "ad hoc" cooperation to the integration of this cooperation into the European Union institutions. In December 1988 the Coordinators Group was created and in the first half of 1989 the "Palma Document" was approved by the European Council. This transition ended formally with the entry into force of the Maastricht Treaty, in November 1993.

The fourth period refers, therefore, to the Intergovernmental Cooperation developed under the framework of the Treaty on European Union, when all the practical structures be set up and functioning. The legal and institutional framework introduced by the Treaty on European Union will be examined in the next chapter.

A) LEGAL ISSUES

1 - EC Competence and Intergovernmental Cooperation Activities

The Community competence on matters relating to third country nationals was examined in chapter 2. Chapter 3 analysed the extent to which Article 7A of the EC Treaty required the Community to adopt measures on third country nationals, with particular emphasis on the area of abolition of border controls on persons. In chapter 2, it was recalled how Article 100 and particularly Article 235 have been used to enact legislation in a wide range of fields, supposedly relevant to the common market. It was submitted that measures concerning third country nationals had a similar or even greater relevance for the establishment, functioning, and operation of the common market, and for the attainment of Community objectives. In chapter 3, this idea was emphasised in the light of the new objective of the establishment of a market "without internal frontiers", as set out in Article 7A of the EC Treaty. It was submitted that Article 7A established a duty for Community institutions to act for the attainment of that new objective.[3] It was explained how the attainment of that objective required the adoption of measures regarding third country nationals. Consequently, this duty to act would include the obligation to adopt measures regarding third country nationals. However, in chapter 3 it was also stressed that the Council could not act without proposals from the Commission and that no such proposals had been presented.[4]

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[3] Whether or not that provision is considered capable of having (partial) direct effect, as suggested in chapter 3.

[4] This was the result of a a "realistic" approach", adopted as early as 7/12/1988 in COM (88) 640 final. Conscious of the difficulties of securing the required unanimity in the Council to approve measures in this area, the Commission decided to wait for the results of the Intergovernmental Cooperation. Recently, in July 1995 the Commission presented some proposals for Community instruments on the right to travel of

Thus the behaviour of the Commission is a key point in the appreciation of the relationship between Intergovernmental Cooperation activities and the issue of the limits of Community competence. In as much as the Commission does not make proposals to the Council, it seems rather fruitless to determine whether, and to what extent Intergovernmental Cooperation questions Community competence. Since Community competence can only be exercised by the Council on a proposal from the Commission,[5] then, the fundamental and prior legal issue in this context is the possibility of judicial action against the Commission for its failure to act. This was also examined in chapter 3. Moreover, that chapter referred to the case initiated by the European Parliament against the Commission on this matter.[6]

The European Parliament has in several occasions criticised the Member States for acting through Intergovernmental Cooperation in the field of the abolition of border controls and free movement of persons. It considered that such cooperation contravened the Treaties because that field was within Community competence. Accordingly, the Parliament called on the Commission to stop collaborating with Intergovernmental Cooperation and to present draft Community measures in that field. It asked it to be mindful of its role as guardian of the Treaties[7] and even invoked the possibility of the Commission using Article 169 against Member States. It also called on the Council and the governments of the Member States to conduct their intergovernmental work on the free movement of persons and internal security in a Community context.[8]

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third country nationals and announced that it will present proposals for a limited right of freedom of movement (see above, chapter 4). Besides, subsequent to the Treaty on European Union, the Commission has been developing other activities related to third country nationals, but mainly under the framework of Title VI of the Treaty on European Union.

[5] Article 152 of the EC Treaty provides that the Council "may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any proposals." However, the problem is not that the Council wants to adopt measures on third country nationals and the Commission does not present it with adequate proposals. On the contrary, the problem is that the Commission does not present proposals to the Council on third country nationals because the latter does not want to adopt them.

[6] Case C-445/93, Parliament v. Commission, abstract of the Parliament's petition in OJ C 1/12 of 4/1/1994.

[7] Note that the first indent of Article 155 states that "the Commission - shall ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied".

[8] For all these assertions and suggestions see, e.g., the following European Parliament resolutions: resolution on the right of asylum, of 12 March 1987, DOC. A2-227/86; resolution on the signing of the Supplementary Schengen Agreement, of 23 November 1989, doc.ref. B3-583/89, OJ C 323/98 of 27/12/1989; resolution on the free movement of persons in the internal market, of 15 March 1990, doc.ref. B3-291, 300 & 310/90, OJ C 96/274 of 17/4/1990; resolution on migrant workers from third countries, of 14 June 1990, OJ C 175/180 of 16/7/1990; the resolution on the Schengen Agreement and the Convention on the right of asylum and the status of refugees as defined by the ad hoc Group on Immigration, of 14 June 1990, OJ C 175/170 of 16/7/1990; the resolution on relations between the European Parliament and the Council, of 10 October 1990, document B3-1734/90; resolution on the harmonisation of polices on entry to the territories of the EC Member States, with a view to free movement of persons, and the drawing up of an inter-governmental Convention among the 12 Member States of the EC, of 22 February 1991, OJ C 72/213 of 18/3/1991. See also the draft report on the freedom of circulation of persons and security in the European Communities, adopted on 1 March 1991 by the Committee on Legal Affairs and Citizens Rights, Document PE 143.354/B/rev.

The position of the European Parliament in these matters seems to be basically correct. In the field of the abolition of border controls and free movement of persons, and particularly in the field of immigration and immigrants from third countries, it can be argued that most of the work of the Intergovernmental Cooperation could have been done within the Community framework.

In any case, the Parliament's requests to the Commission did not make the latter change its position. The Commission continued to collaborate with the intergovernmental groups and did not present any proposals to the Council in the areas mentioned above. Thus it appears that little can be done against the wishes of the governments of the Member States and the Council itself. According to the system of the Treaties, judicial action against Intergovernmental Cooperation must begin by questioning the Commission's failure to act. As mentioned in chapter 3, this was already done by the European Parliament when it initiated the proceedings against the Commission.

In this context, it is also worthwhile to note Timmermans remarks on Community competence and Intergovernmental Cooperation. He maintains that:

> "(...) there can scarcely be any doubt that, the abolition of internal border controls of *persons*, which is part of the completion of the internal market, depends in part on the creation of a common regime on a number of issues related to immigration and national rules and policies relating to aliens; and that to that extent the Community is competent to enact such a regime by way of harmonisation directives under Article 100 EEC."[9]

Furthermore:

> "where all Member States agree on the necessity of a common action on the level of the Twelve and the Community holds the necessary powers to act, the Community as such should act, not its Member States by negotiating agreements in an intergovernmental framework."[10]

However, as Timmermans admits,

> "The situation becomes complicated where all Member States do agree on the necessity of a common regime for the twelve but disagree on the existence or the extent of Community powers to enact such regime".[11]

To deal with this, he suggests that the Commission should start infringement procedures against Member States for breach of Community competence, under Article 169, or that it starts action under Article 175 against the Council for failure to act (if the latter did not act on Commission proposals). Alternatively, or in addition, the Commission could ask (under the second paragraph of Article 228(1)) for the opinion of the Court of Justice on the compatibility with EC Law of agreements concluded by the Member States.[12]

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[9] Timmermans, C.W.A., "Free Movement of Persons and the Divisions of Powers Between the Community and its Member States - Why do it the intergovernmental way?", in *Free Movement of Persons in Europe: Legal Problems and Experiences*, T.M.C. Asser Institute Colloquium on European Law, Session XXI, 1991, Schermers, H.G. et al. (eds.), Dordrecht, Martinus Nijhoof, 1993, pp.352-368, at 361.

[10] Idem, at 362. This is the result of what Timmermans calls "a classical example of construing a Community competence", namely in that such competence is implied by a "fairly general phenomena": "the external dimension of the internal market". He recalls that the legal basis of the latter dates back to such well known cases as Case 22/70, ERTA [1971] ECR 263.

[11] Timmermans, op. cit., at p.363.

[12] That provision being used by analogy or with an expansive interpretation.

As far as Schengen is concerned, it may be recalled that the Community competence in relation to issues concerning the free movement of persons (as far as abolition of internal border controls and third country nationals are concerned) is not an exclusive competence, as it is mainly based in Articles 100 and 235. Thus, according to Timmermans, that competence does not exclude action by the Member States "as long as the Community powers remain unused". Agreements by some Member States, of transitional character, "allowing for a final solution on Community level" and also otherwise respecting Community Law, "do not seem to pose any difficulty from a Community point of view".[13]

Finally, it should be mentioned that Article 5 may also be of relevance to relations between Community competence and Intergovernmental Cooperation.[14] That Article states that:

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

This provision[15] could help to clarify why and to what extent Member States should not engage in Intergovernmental Cooperation in order to respect Community competence. Clearly, Article 5 would be particularly pertinent if the Commission wanted the Community to exercise its competence in this field.

The Court of Justice has already used Article 5 to define limits and duties for Member State action in matters in which the Council does not exercise Community competence. Most of these cases concerned areas in which the Community had exclusive competence, like the common market on agriculture. However, Kapteyn & Verloren van Themaat have already wondered,

> "whether the Court, in the face of further stagnation in the decision-making process, would not draw positive or negative legal consequences on the basis of

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[13] Timmermans, "Free Movement of Persons...", op.cit., p.362. Before the entry into force of the Treaty on European Union, the matter had to be addressed in this manner because in the EC Treaty there is no provision such as Article 233 of the latter (allowing for more close regional integration between Benelux countries) which could be applied to any cooperation between EC Member States, such as that of Schengen. After the entry into force of the Treaty on European Union, its Article K.7 of the latter clears the Schengen cooperation, as will be referred to below in the main text and in the next chapter. On the relations between Schengen and the European Community see also Philip, C. & Boutayeb, C. "Schengen (Accords de -)" in *Dictionnaire Juridique des Communautés Européennes*, Barav, Ami & Philip, Christian (eds.), Paris, P.U.F., 1993, pp.981-991, at pp.989-991.

[14] On Article 5 of the EC Treaty, see Constantinesco, Vlad, "L'article 5 CEE de la bonne foi à la loyauté communautaire", in Capotorti et al. (eds.) *Du Droit International au droit de l'intégration: Liber Amicorum Pierre Pescatore*, Baden-Baden, Nomos, 1987, p.97; Lang, John Temple "Community Constitutional Law: Article 5 of the EEC Treaty", *CMLRev*, Vol.27, 1990, No.4, pp.645-681; and Kapteyn, P.J.G. & Themaat, P. Verloren Van *Introduction to the Law of the European Communities*, 2nd. ed., Deventer, Kluwer, 1989, pp.86-91.

[15] Eventually together with other EC Treaty provisions, as is common in the Court of Justice's doctrine on Article 5.

> Article 5 for the actions of the Member States in other areas in which the Council or the Member States were obliged to act in solidarity but had to do so."[16]

Admittedly, Kapteyn & Verloren van Themaat did not have in mind the area discussed in this chapter. However their idea could be one way for the Court of Justice to positively influence the issue of the division of competence between Member States and the Community, and to stress the Community powers in this area.[17]

Timmermans suggestions and the possible use of Article 5 suggested by Kapteyn & Verloren van Themaat may be read as reinforcing the basic position of the European Parliament: i.e. that most of the fields in which the Intergovernmental Cooperation acts are fields in which the Community could or should also act. However, they also indicate that everything initially depends on the Commission's position, and on the Court of Justice's appreciation of it.

2 - The Relationship between substantive rules of EC Law and binding rules enacted in the Intergovernmental framework[18]

From the point of view of Community Law, if any binding rule enacted as a result of the work of Intergovernmental Cooperation conflicts with a positive and substantive rule of Community Law, then the latter has primacy. This follows, for example, from Article 5 of the EC Treaty.

In principle, conflict should not arise. The only binding instruments adopted within the Intergovernmental Cooperation framework were the Dublin Convention - which is not yet in force - and the Schengen Agreements.[19] Besides, intergovernmental rules or decisions usually contain express clauses according priority to EC Law. This is important from the point of view of International Public Law, because Article 30 of the Vienna Convention of the Law on Treaties[20] states that:

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[16] Op.cit., p.89, referring also to Zuleeg in *Kommentar zum EWG-Vertrag*, Von Der Groeben et al., 3rd ed., Baden-Baden, Nomos, 1983, Vol.1, p.168. Both Zuleeg and Kapteyn & Verloren van Themaat stress, however, that the Court does not have the power to determine Community policy. Yet, this accurate consideration does not seem to exclude the use of Article 5 in connection with other provisions of the EC Treaty, e.g. Article 7A and 175.

[17] See also Lang, *CMLRev*, op.cit. supra. He refers in detail to the various duties that Article 5 imposes on Member States, namely their duty to implement Community objectives (pp.657-659), to take collective action and to cooperate with other Member States (p.671). Furthermore, he also makes an interesting analysis of the repercussions of Article 5 for competence rules and conflict rules (pp.673-677).

[18] See, O'Keeffe, David "The Schengen Convention: A Suitable Model for European Integration?", *YEL*, 1991, pp.185-219, at pp.209-211 and, in a more general manner, Philip & Boutayeb, "Schengen (Accords de-)", op.cit., at pp.989-991.

[19] The initial Schengen Agreement, the Schengen Implementing Agreement and the readmission agreement between the Schengen Contracting Parties and Poland.

[20] Concluded on 23 May 1969, entered into force on 27 January 1980, UN Doc A/Conf. 39/27, 1969, or International Legal Materials (ILM), Vol.8, 1969, p.679. The Convention was not ratified by all Member States (France, Ireland, Luxembourg, Portugal and the United Kingdom are not parties to it) but is generally regarded as being the expression of the rules of customary international law on the subject. See Bernhardt, Rudolf "Interpretation in International Law", in *Encyclopaedia of Public International Law*, Bernhardt, Rudolf (ed.), Amsterdam, North Holland, 1984, Vol.7, p.318 at 321. Also pointing in that direction see Schermers, "The effect of the date 31 December 1992", *CMLRev*, Vol.28, 1991, No.2,

"When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail".

One such reservation clause is Article 134 of the Agreement Implementing the Schengen Agreement [hereinafter the Schengen Implementing Agreement]. It states that:

"The provisions of this Convention shall apply only insofar as they are compatible with Community law".[21]

As O'Keeffe recalls, there are a number of possible areas of conflict between Community Law and the Schengen Implementing Agreement, namely because both have rules on the same subject matters. Among such areas of conflict there are those related to firearms, checks on hand baggage when taking (Community) internal flights, data protection, the position of third country nationals protected by Community Law, and border controls between Schengen States and other Community Member States that are not parties to Schengen.[22] However, the principle established in Article 134 of the Schengen Implementing Agreement should be sufficient to justify the predominance of Community Law.[23]

The Dublin Convention is less straightforward than the Schengen Implementing Agreement in this regard. The Dublin Convention provides only in generic terms for the possibility of its own revision or amendment, if that is necessary:

"pursuant to the achievement of the objectives set out in Article 8A of the [EC Treaty], such achievement being linked in particular to the establishment of a harmonised asylum and a common visa policy".[24]

In this situation, the rules of the Vienna Convention do not seem to favour the priority of Community Law, as Article 30 (3) of that Convention establishes that:

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pp.275-289, at p.276, and him with Waelbroeck, Denis in "Judicial Protection in the European Communities", 5th ed., Deventer, Kluwer, 1992, p.102, note 463.

[21] Therefore Article 30(4) of the Vienna Convention (on the relations between a later Treaty and an earlier Treaty when the latter is concluded between only some of the Contracting Parties of the former) does not apply in this case. Note also the existence of Article 142 of the Schengen Implementing Agreement, providing for the possibility of replacing or amending the Agreement itself "When Conventions are concluded between the Member States of the European Communities with a view to the completion of an area without internal frontiers...". It is also interesting to note that Article 1 of the same Agreement defines alien as "any person other than a national of a Member State of the European Communities".

[22] See O'Keeffe, "The Schengen Convention..."op.cit., at pp.209-210. O'Keeffe also recalls that Community law is incompatible with lack of respect of human rights, as established e.g. in the European Convention of Human Rights and Fundamental Freedoms. An eventual incompatibility between these human rights rules and the Schengen Agreements would seem to give rise to conflicts with Community Law only insofar as the scope of the latter is concerned.

[23] In the meantime, as will be recalled in the next chapter, Article K.7 of Title VI of the Treaty on European Union provides that "The provisions of this chapter shall not prevent the establishment or development of closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for in this Title". This rule does not seem to allow a disregard for Community Law, because it refers only to the relations between other Intergovernmental Cooperation and Title VI itself, and not to the relations between other Intergovernmental Cooperation and Community Law.

[24] Article 16 of the Dublin Convention. Note that this provision did not exist in an earlier version of the Dublin Convention, see "Nieuws - Convention on the right of asylum", *NJB*, 65th Year, 27 January 1990, No.4, pp.165-170.

> "When all parties to the earlier treaty are parties also to the latter treaty but the earlier treaty is not terminated (...) the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty."[25]

However, from the perspective of Community Law, if and when the Community adopts rules on matters of asylum which are dealt with by the Dublin Convention, those Community rules should be considered as having priority over the Dublin Convention. Furthermore, another element of the Dublin Convention may throw a different light on an eventual conflict between the provisions of the Convention and Community Law. A recital of the Preamble of the Convention states that the Heads of State concluded it,

> "Considering the joint objective of an area without internal frontiers in which the free movement of persons shall, in particular, be ensured, in accordance with the provisions of the Treaty establishing the European Economic Community, as amended by the European Single Act (...)"[26]

It may be argued that this statement demonstrates that the Contracting parties to the Dublin Convention did not wish to contravene their obligations under Community Law, in particular those derived from current (or later) EC rules on the free movement of persons.

Other decisions of the Intergovernmental Cooperation usually contain reserve clauses safeguarding Community Law. This is the case for the resolutions on the admission of third country nationals into the Union Member States.[27] It is also the case, for example, for the ministerial agreement on the establishment of the Europol Drugs Unit, signed in Copenhagen on 2 June 1993.[28]

This again reinforces the assertion that Community rules should prevail over rules enacted in the framework of the Intergovernmental Cooperation. The repeated statements to this effect included in legal instruments and official documents of that cooperation seem to indicate that the EC governments do not question that assertion. Furthermore, according to Article 219 of the EC Treaty, the Court of Justice of the European Communities is the sole judicial organ with jurisdiction in Community Law.[29] Presumably, in a conflict situation, the Court of Justice would uphold the substantive rules of Community Law against rules produced by the Intergovernmental Cooperation.[30]

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[25] See also Article 39 of the Vienna Convention.

[26] In an earlier version of the Convention this recital consisted simply of the following text: "Resolved to achieve their joint objective of a land space without borders, in accordance with the Single European Act". See again "Nieuws - Convention on the right of asylum", op.cit., p.166.

[27] See section B of chapter 8.

[28] It stated that "The activities of the Unit will be without prejudice to other forms of bilateral and multilateral cooperation in relation to combating illicit drug trafficking and other related activities, nor to the competences of the European Community." See the full text of that agreement in part 3 of *STATEWATCH Eurofile* No.1, London, Statewatch, 1994.

[29] Or, more precisely, to appreciate a "dispute concerning the interpretation and the application" of the EC Treaty.

[30] Note also that Article N of the Treaty on European Union (which roughly substituted the old Article 236 of the Treaty of Rome) provides for the amendment of the Union treaties according to a specific procedure. Admittedly, that provision could be implicitly over-ruled by a new Treaty between all Member States, but it shows that the intentions of the Member States is that of ensuring that the Union treaties are only revised in the agreed manner. Indirectly this would ensure the supremacy of Community Law: in order to be changed the latter would have to be modified in the manner envisaged by the Union treaties, not by making new treaties on the same subject matters.

B) INTERGOVERNMENTAL STRUCTURES AND ACTIVITIES[31]

1 - Cooperation Between the 12 Member States

a) The TREVI Group[32]

The origins of the Trevi Group date back to the 70's and its initial objective was to improve cooperation in combating of terrorism in the Community. However, its role was later extended to deal with police cooperation in general, including cooperation against drugs trafficking, against international organised crime, on police technical matters, and, to a certain extent, even on the combating of illegal immigration (in one of its sub-groups).

The creation of TREVI was preceded by several intergovernmental meetings on terrorism held in 1971 and 1972. In December 1975, in Rome, the Council of Ministers approved British Foreign Secretary James Callaghan's proposal to set up a special working group to combat terrorism in the EC.[33] The proposal was formalised in the next meeting of the EC Interior Ministers on 29 June 1976. From then onwards, when they held their meetings, the Interior Ministers were accompanied by senior police and security service officials.

The members of the Trevi group were the then Member States of the EEC. Other countries attended the meetings as observers or were briefed by the "troika" officials after

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[31] The most important works on this issue, in general, are: Benyon, J. et al., *Police Co-operation in Europe : An Investigation*, Centre for the Study of Public Order, University of Leicester, November 1993; Bunyan, T. (ed.), *Statewatching the New Europe - a Handbook on the European State*, London, Statewatch, 1993; Cruz, A., *Schengen, Ad hoc Immigration Group and other European Intergovernmental Bodies - in view of a Europe without internal borders*, CCME Briefing Paper No.12, Brussels, CCME, June 1993. These are the main sources of the facts referred in this chapter and have further details. See also Bonnefoi, S. A., *Europe et sécurité intérieure: Trevi, Union Européenne, Schengen*, Paris, Delmas, 1995; Bunyan, T. & Webber, F., *Intergovernmental Co-operation on Immigration and Asylum*, CCME Briefing Paper No.19, Brussels, CCME, April 1995; Carlier, J.Y., "L'Europe et les ressortissants des Etats tiers: de la coopération intergouvernementale vers le droit communautaire ", *Actualités du Droit (Revue de la Faculté de Droit de Liége)*, 1993, No.2, 1993, p.207; Cruz, A., *An insight into Schengen, Trevi and other European Intergovernmental bodies*, CCME Briefing Paper No.1, Brussels, CCME, April 1990; École Nationale d'Administration, *Mise en oeuvre du traité de Maastricht et construction européenne*, Vol.I., Paris, ENA - La Documentation Française, 1994, pp.176-246; and the "Appendix 1- Glossary of Groups", in the quoted supra *Statewatching...*, p.173. Specifically on police cooperation see Fijnaut, Cyrille "International Policing in Europe: Present and Future", *ELR*, Vol.19, December 1994, No.6, pp.599-619.

[32] See Bunyan, T., "Trevi, Europol and the New European State", in *Statewatching...*, op.cit., p.15 and Benyon, John (& others) in "The Trevi Group" in *Police Co-operation...* quoted supra, p.152.

[33] The origins of the name are uncertain. Some say that it is an acronym for "Terrorism, Radicalisation, Extremism and Violence International". Others, perhaps with a more romantic perspective, assure that the acronym is an invention, the name being inspired by the *Fontana di Trevi* (which was close to the place in Rome where the meeting that decided its creation was held), and by the Dutch initiator of the group, Mr. Fonteijn (the then Director General for Police and Alien Affairs at the Netherlands Ministry of Justice). See Bunyan, T., article quoted in the preceding footnote, (his) p.34, footnote 3 (expressing doubts on the exact explanation of the acronym) and Cruz, *Schengen, Ad hoc Immigration Group and other...* ", quoted supra, at pp.18-9 (saying the acronym is an invention of journalists and that in fact it refers to the Dutch initiator).

the meetings. These countries were called the "Friends of Trevi" and were: Argentina (briefed by Spain), Austria, Canada, Finland (briefed by Denmark), Hungary (briefed by Germany), Morocco, Norway, Sweden, Switzerland and the U.S.A.[34]

As far as third country nationals were concerned, the work of Trevi increased in the period of the establishment of the single internal market. The Trevi Group became one of the main "fora" responsible for the creation of the so called "compensatory measures", supposed to be necessary for the lifting of the Community's internal frontiers. In the meantime, the Ad hoc Working Group on Immigration, created in 1986, took over the work on immigration matters which were less, or not at all related to security concerns.

Later on, the Maastricht Treaty brought most of the fields of activity of the Intergovernmental Cooperation under the "Third Pillar" of the European Union. This was reflected in the Trevi Group also. Presently all the work of Trevi proceeds under the framework of Title VI of the Maastricht Treaty, with the exception of terrorism.[35]

The "Trevi Group" operated with a three level structure.

First, there was the ministerial level: the ministers with responsibility for policing and internal security affairs. They met usually every six months (in June and December) in the country holding the European Presidency. They had overall political responsibility for Trevi.

Secondly, there was the Trevi group of senior officials. It was formed by senior officials and civil servants from each member state and, sometimes, also by senior police officers. It received reports from the working groups and was responsible for the coordination of their work. It was also responsible for giving policy advice to the ministers. Thus it met at least every May and November, before the ministerial meetings. It made reports on the progress of the Trevi work to the Ministers' meetings and also to the meetings of the Coordinators Group.

Although the Commission had previously unsuccessfully requested access to this group, only from the beginning of 1992 onwards were the representatives of the Commission allowed to attend the meetings of the senior officials group as observers.[36]

On a third level, were the working groups into which the TREVI Group was sub-divided. They were formed by civil servants, police officers, immigration and customs officials and representatives from relevant organisations, such as security services.

The Trevi working groups were the following.[37]

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[34] In some occasions, Trevi meetings were even attended by US Attorney Generals and the chief of the US Drug enforcement Administration, according to Associated Press, 3/6/88 and 12/5/89, quoted by Bunyan, T. in "Trevi, Europol and the New European State", op.cit., p.15 at p.34, footnote 6.

[35] Agreement was reached that cooperation against terrorism will be part of Europol activities no later than two years after it has begun to function. This will be possible only after ratification of the Europol Convention. See Article 2(2), second paragraph, of the Europol Convention concluded on 26 July 1995, OJ C 316/2, of 27/11/1995. Therefore, it will still take some time before Trevi I and the Police Working Group on Terrorism (and the TSFN - Trevi Secure Fax Network) cease their activities completely .

[36] See Bunyan, T. in "Trevi, Europol and the New European State", p.15 at 34, footnote 5.

[37] In the beginning (1976), three other sub-groups were also created: Trevi III would deal with security procedures for civilian air travel (this field was later attributed to Trevi I), Trevi IV would work on safety and security at nuclear installations and transport, and Trevi V on contingency measures to deal with

Trevi I was the sub-group on terrorism: it had the objective of facilitating concerted action at a European level against terrorists. It was created by the Trevi Ministers meeting on 31st May 1977 and was the only one to have an operational role, as opposed to one of mere coordination. Apparently, this was the group in which the Trevi work was most successful. Trevi I was also charged with security procedures for civilian air travel, a subject initially attributed to the planned, but never installed, sub-group Trevi III. The Trevi Ministers in Copenhagen, on 1-2 June 1993, gave the Trevi I working group, which dealt with terrorism, the additional task of investigating the extent to which racist attacks were carried out by organised groups, namely extreme-right groups.[38]

Trevi II was the technical sub-group. It was established by the same meeting that created Trevi I. In the beginning, its activities were mainly concerned with cooperation and exchange of information as well as experience in technical matters, such as police equipment, police training and forensic science. Later, the work of the group extended to cooperation and exchange of information on the maintenance of public order, on action against football hooliganism and on policing of road traffic. It also did work on "police communications on an EC-wide level, with agreement needed between Schengen and non-Schengen countries".[39]

Trevi III was the sub-group on organised international crime. Its role was re-defined by the Trevi Ministers meeting in Rome on 21 June 1985, as the initially planned Trevi III group was never implemented. Subsequently, it worked on serious organised international crime at a strategic, tactical, and technical level.[40] It concentrated on drug trafficking[41] and its work was at the origin of the creation of the European Drugs Unit and of Europol. In April 1987, the group decided to post Drug Liaison Officers in drug producing and transit countries.[42] It was agreed that those officers would work closely together and share information. Furthermore, each Member State undertook to establish a national drugs intelligence unit. When all these became functional, it was possible to envisage the creation of a European Drugs Intelligence Unit to coordinate their activities. The E.D.U. is now functioning and constituted the first step towards the creation of Europol, the Convention for which was recently concluded.[43]

An important part of the work of Trevi III was on immigration controls at borders. This sub-group was responsible for such work until the Trevi 1992 working group was

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emergencies (disasters, fire prevention and fire fighting). None of these groups ever met. Trevi III was given a new role in 1985, as noted in the main text.

[38] See *Financial Times*, 3/6/1993, p.22; and *Statewatch*, Vol.3, May-June 1993, No.3. Apparently Trevi I is still functioning now, but there are no reports on whether it actually worked on racist activities and with what results.

[39] According to the report on Trevi II, presented to the Trevi Ministers at their meeting on 1 December 1992. See Bunyan, T. in "Trevi, Europol and the New European State", p.15 at 19.

[40] Another working group was created in a meeting on 19 September 1992 also to deal with organised crime. However, while Trevi III is only composed of police authorities, this is a mixed group in which judicial authorities participate too. See Cruz, *Schengen, Ad hoc Immigration Group and other...* , quoted supra, at p.19.

[41] Trevi III dealt also with armed robbery, the protection of witnesses, stolen vehicles, environmental crime, money-laundering and illicit traffic in works of art. Furthermore, it worked on crime analysis, on developing a common police terminology and on the harmonisation of techniques of investigation.

[42] Initially in the USA, India, Finland, Canada, Norway and Sweden.

[43] See infra, on Europol.

created. When Trevi 1992 was abolished, Trevi III recovered the responsibility for the detailed work on immigration controls.

Trevi 1992 was set up on 9 December 1988 and was given its name at a meeting in Madrid in April 1989. It was created to study the "policing and security implications of the European Single Market", for example in relation to the lifting of Community internal frontiers. It aimed at improving cooperation to "compensate for the consequent losses to security and law enforcement".[44] The main work of Trevi 1992 was drafting the "Trevi Programme of Action", for the whole Trevi Group, which was adopted at the ministerial meeting in Dublin in June 1990. However, the Trevi 1992 Group also worked with the customs group MAG 92 and the Ad Hoc Working Group on Immigration to give: "early attention to the study of a possible computerised information system for law enforcement purposes which would operate for the benefit of all Member States".[45] This refers to the European Information System. Trevi 1992 was dismantled by the Ministers meeting in London on 30 November 1992, as the ministers considered it had fundamentally attained its original objectives. The Trevi Senior Officials group was given general coordination responsibilities on immigration controls and Trevi III got back responsibility for the remainder of work on the same subject matter.

The Ad Hoc Working Group on Europol was also part of the Trevi structure. It was set up after a meeting in Luxembourg in June 1992, following the report on "The Development of Europol" agreed in Maastricht in December 1991. Later, this ad hoc working group took over part of Trevi 92 and Trevi III 's work. It was responsible for the preparation of the Europol Drugs Unit (E.D.U.) and of Europol. It drafted the ministerial agreement creating E.D.U.[46] Furthermore, until the entry into force of the Treaty on European Union, it was preparing the Convention on the establishment of Europol. The Project Group on Europol was set up to help the Working Group on Europol. According to the agreement signed by Trevi ministers in June 1993, the Project Group was to investigate the most efficient means for exchanging intelligence on traffic of drugs and associated money laundering activities.

Finally, it may be recalled that, as far as Trevi is concerned, the senior officials group and the working groups had frequent meetings,[47] more than the ministerial group. The working groups made a report before each ministerial meeting, which was channelled through the senior officials group. In addition, and similarly to the EC and EU, there was the Trevi "troika". It was formed by three senior officials, one from the current presidency, one from the previous and a third from the next one. They were responsible for the

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[44] Briefing note on Trevi prepared by MS18 (the European Unit in the Metropolitan Police of the United Kingdom) on 26/2/90, Home Affairs Select Committee, 363-I, p.xxi, quoted by Bunyan, T. "Trevi, Europol and the New European State", in *Statewatching...*, op. cit., p.15 at 34, footnote 9.

[45] Idem, at p.31.

[46] See *Statewatch*, Vol.3, May-June 1993, No.3.

[47] Sixty four meetings in the framework of the Trevi Group were counted for 1991 and 1992 (41) and 1993 (23). For details see "Appendix 3 - Secret Europe: List of Meetings", in *Statewatching...* quoted supra, pg.185 and *Statewatch* bulletin, vol.4, No.1, January-March 1994, pg.9. See also "EU: list of secret meetings, 1991-1992, under the 'third pillar' (policing, immigration and judicial cooperation)" and "EU: list of secret meetings, 1993" in *STATEWATCH Eurofile no 1*, London, Statewatch, 1994. For adjournments see the *Statewatch* bulletin.

administration of the Trevi group and assisted and briefed the current Presidency and its officials. The "troika" method was also used for individual working groups, like the one on terrorism. Finally, the Trevi secretariat was not permanent and was provided by the State which held the presidency. Therefore, every six months it moved from one EC capital to another.

b) The Ad Hoc Working Group on Immigration

This group was created as a result of a British initiative, on 20 October 1986, in London, in a meeting of EC Ministers responsible for immigration, counter-terrorism and drugs, and a representative of the Commission. Its task was "to consider the coordination of visa policies, measures to eliminate abuse of the right of asylum and fraud in connection with passports, as well as ways of reconciling stricter surveillance at the Community's external frontiers with the elimination of formalities at its internal frontiers"[48]

The creation of this group symbolises the beginning of the second phase of the Intergovernmental Cooperation. The European Single Act established the new objective of building up an internal market "without internal frontiers". The future abolition of internal border controls made a new approach on issues related to immigration necessary. The importance of controlling the movements of persons increased. From then onwards, immigration related matters were no longer merely one of the various fields in which security was at stake, that were treated by working groups concerned with security like Trevi. Immigration matters had to be addressed as a field in its own right, with a whole range of problems to be solved. At one point, it was envisaged that the responsibilities that were eventually accorded to the Ad Hoc Working Group on Immigration, would be put under the framework of the Trevi Group to form a "Trevi IV". However, in the end it was decided to set up the Ad Hoc Working Group on Immigration to be coordinated by the Commission.[49] The importance of the security aspects of the movement of persons increased with the prospect of total abolition of border controls. The need for common action was stronger than before. That need derived from a new factor: in the future Member States could no longer rely on national controls at internal borders. Security controls had to be performed at the external frontiers and reinforced within the territory of the Member States. Both types of security controls had to be harmonised to ensure their concrete and global efficiency.

The Ad Hoc Working Group on Immigration [hereinafter AHWGI] met for the first time on 26 November 1986[50] and set up the first two working sub-groups: on the Right of Asylum and Forged Documents.[51] Soon, three other sub-groups were created: on

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[48] 20th General Report on the Activities of the European Communities, point 998. See also Bull.EC, 10/1986, pp.75-77.

[49] Cruz, *Schengen, Ad hoc Immigration Group...*, op.cit., p.16.

[50] The full list of the meetings of the AHWGI (at a ministerial level) is the following: 26/11/86, 28/4/1987 in Brussels, 9/12/1987 in Copenhagen, 3/6/1988 in Munich, 9/12/1988 in Athens, 12/5/1989 in Madrid, 15/12/1989 in Paris, 15/6/1990 in Dublin, 7/12/1990 in Rome, 13-14/6/1991 in Luxembourg, 2-3/12/1991 in The Hague, 11-12/6/1992 in Lisbon, 30-11&1/12/1992 in London and 1/6/1993 in Copenhagen. In May 1993, in Kolding, Denmark, there was also a meeting of the Interior and Justice Ministers which dealt with some issues related to immigration. See Bull.EC of the relevant months.

[51] Bunyan, T. in "Trevi, Europol and the New European State", p.15 at 34, footnote 12.

External Frontiers, on Expulsion and Admission and on Visas. Later a special sub-group on Refugees from ex-Yugoslavia was also created.

The Commission was a full member of the group and the secretariat was provided by the general secretariat of the Council. The group reported to the ministers of the Interior of the Member States, not to the Trevi ministerial group, as such.[52]

After its creation, the AHWGI became the Working Group responsible for almost all the work in the field of immigration from third countries, and in general, for most of the work on control of movements of persons coming from and going into the Member States. The most important binding instrument which it concluded was the so-called Dublin Convention: the Convention on the determination of the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities.[53] This Convention was concluded in June 1990. It was the only formally binding instrument agreed upon in the framework of Intergovernmental Cooperation. It was signed by all Member States[54] but it has not yet entered into force because two Member States have not yet ratified it.[55] Another Convention drafted by the AHWGI was the Convention on the Crossing of External Frontiers. It was supposed to be signed in June 1991, but until now this was not possible due to the disagreement between the United Kingdom and Spain on the status of Gibraltar. It is important to note that the External Frontiers Convention included several important measures envisaged by the "Palma Document"(discussed below in relation to the Coordinators Group), which to the present time have not been implemented. Recently, the Commission presented a new draft of this Convention in the framework of the Third Pillar of the European Union.[56]

Besides the drafting of these Conventions, the AHWGI has dealt with a wide range of matters relating to the harmonisation of immigration and asylum policies. However, no other legally binding instrument has been adopted. In the field of asylum, besides the Dublin Convention, the AHWGI adopted several resolutions and conclusions with the general aim of limiting the possibilities of presenting asylum applications.[57] In April 1987, for example, the group proposed the application of sanctions on airlines transporting passengers without the required travel documents or with false documents. Such resolutions and conclusions do not have legal binding force, but in practice their standards have already begun to be applied by some Member States. The AHWGI has also approved several resolutions on the admission of immigrants from third countries, as well as on action against illegal immigration and on expulsion. These will be dealt in detail in chapter 8. Furthermore, the AHWGI worked on the approximation of visa policies and on the production of a manual of common instructions for consular posts. The AHWGI also proposed the creation and did some of the preparatory work for the installation of CIREA (Centre for Information, Research and exchange on Asylum),[58] EURODAC (European Automated Fingerprint Recognition System, to control, e.g., the fingerprints of asylum

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[52] Benyon, John et al. *Police Co-operation in Europe...*, op.cit., p.162.
[53] Published in Bull.EC, 6/1990, pp.155-162.
[54] By 11 Member States in 15 June 1990 and later also by Denmark.
[55] Ireland and the Netherlands did not yet ratify it.
[56] COM (93) 684 of 10/12/1993, analysed in chapter 8, section A.
[57] See Bunyan, T. & Webber, Frances *Intergovernmental Co-operation...*" op.cit., at pp.24-30.
[58] The setting up of which was approved by the immigration ministers at the end of 1991.

seekers) and CIREFI (Centre for Information, Research and Exchange on the crossing of Borders and Immigration).[59] Finally, the AHWGI kept regular contacts with third countries in matters relating to its field of interest, including the conclusion of the so-called "parallel Conventions" to the Dublin and External Frontiers Convention, and the conclusion of readmission agreements with third countries.

c) Other Early Working Groups

There were some other working groups dealing with matters directly or indirectly related to the establishment of the internal market, and in particular with the consequence of the abolition of internal controls. The following are the most important of these groups.

The Working Group MAG (Mutual Assistance Group) was responsible for customs cooperation. It dates from 1972, when it was set up in the framework of the 1967 Naples Convention, on mutual assistance in customs matters. At its highest level it brought together the directors of customs services of the Member States.[60] It worked closely with the EC institutions: the Commission provided its co-presidency and secretariat. In addition, the Commission's G.D. XXI (on customs union and indirect taxes) played an active role in it. There were two sub-groups of MAG: MAG and MAG 92. The objective of the first group was to combat the illegal traffic of sensitive goods, namely weapons and drugs. MAG 92 was created in 1989 and had the responsibility of studying and preparing for the consequences for customs arising from the internal market and free movement of persons. Sub-groups of MAG 92 dealt with the up-date of the Naples Convention, the reinforcement of controls at the external frontiers and the installation of a Customs Information System, which was similar to the European Information System. MAG 92 ceased to exist before the entry into force of the Treaty on European Union.[61]

The Ad Hoc Working Group on International Organised Crime was set up in September 1992, in a special ministerial meeting following the assassination by the Mafia of Italian judges, Giovanni Falcone and Paolo Borsellino. The group was established to pursue action against international organised crime. It undertook a survey of organised crime in the EC and compiled a report on that subject for the ministerial meeting of Kolding, in Denmark, in May 1993. The report explained the nature and structure of the Mafia and other organised criminal groups operating in the Community. It also made recommendations on cooperation between Member States to combat organised crime. Interestingly, the Commission and the Council secretariat were observers to the meetings of this group, although they had no formal role within it.

The Police Working Group on Terrorism was created in 1979, following the assassination of the UK ambassador to the Netherlands. It promoted cooperation in the fight against terrorism at a more operational level than that of Trevi. Along with the 12 Member States, membership of this working group also included Austria, Finland, Norway and Sweden. It was this group that developed the fax system later used by Trevi for coded communication.[62]

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[59] The setting up of which was approved by a ministerial meeting in November 1992.
[60] It also includes Turkey, as an observer.
[61] Cruz, *Schengen, Ad hoc Immigration Group...*, op.cit., p.20.
[62] Bunyan, T. "Trevi, Europol and the European State", op.cit., at pp.20-21.

The Judicial Cooperation Working Group on Criminal Matters was part of the European Political Cooperation Group.[63] The group aimed to encourage judicial cooperation by preparing conventions and agreements to facilitate mutual legal assistance. It dealt with extradition, combating the funding of terrorism (on which its work was parallel to that of Trevi I), fraud vis-à-vis the EC budget (parallel to the Commission's work in the *Unité pour la Co-ordination de la Lutte Anti-Fraude*), and mutual legal assistance. The Group on Judicial Cooperation on Criminal Matters drafted a number of treaties in specific issues, but none of these were either signed by all the Member States, or entered in force. The drafted treaties were concerned, for example, with the transfer of condemned persons, the simplification of extradition procedures and the suppression of legalisation of acts. This group, for instance, began the work on what eventually became the Convention on Extradition with the consent of the person concern, which was signed by the representatives of the Member States in March 1995.

Within the framework of European political cooperation, there was also a group which dealt with the fight against terrorism (concentrating on the diplomatic aspects) and another dealing with narcotic drugs. These groups had working ties with Trevi and the Ad Hoc Working Group on Immigration.[64] Other groups working on the fight against drugs were the Pompidou Group and the working group CELAD. The Pompidou group was set up in 1971 and functions within the framework of the Council of Europe.[65] CELAD (*Comité Européen de Lutte Anti-Drogue*) was formally approved by the Strasbourg European Council of December 1989 and aimed to co-ordinate several aspects of the fight against drugs, including prevention, health policy, repression and international aspects of that fight. CELAD was therefore responsible for the coordination of the drugs related work of Trevi III, of MAG and of the working group on drugs operating under the political cooperation framework.

Finally, reference has to be made to the GAFI (*Groupe d'Action Financière Internationale*) which worked against the laundering of capital and to the Horizontal Group, which was set up for the purpose of preparing the technical aspects of the European Information System.

Other working groups did and do exist, but they function within the framework of other international organisations, such as the Council of Europe[66] and thus, fall outside the scope of this thesis.[67]

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[63] The latter was set up in October 1970, following the approval of the Luxembourg (or Davignon) report, with the objective of concerting on and eventually harmonising the foreign policy of the Member States.

[64] Cruz, *Schengen, Ad hoc Immigration Group...*, op.cit., pp.20.

[65] Apparently, there was a further working group on drug addiction, which was created in 1987. Initially it coordinated the Member States' ratification and implementation of international Conventions on the fight against narcotics traffic. Later this group reoriented its activities towards the Community framework and concentrated on the analysis of the health and prevention aspects of drugs consumption. See *Mise en oeuvre du traité de Maastricht...*, pp.183-184.

[66] For a review of other working groups in the field of international migration and asylum see Cruz, *Schengen, Ad hoc Immigration Group...*, op.cit., June 1993, pp.20-25.

[67] For a detailed account of existing working groups in the field of internal security and immigration in Western Europe see "Appendix 1- Glossary of bodies and organisations" in *Statewatching...*, op.cit., at pp.173-181.

d) The Coordinators Group

The proliferation of intergovernmental working groups, with the duplication and overlapping of some of their activities, made the need for coordination more acute. Thus the Coordinators Group (also known as the Rhodes Group) was created by the European Council of Rhodes in December 1988. The objective of this group was to coordinate the work of the intergovernmental working groups so as to reinforce their global efficiency. It also aimed to identify and contribute to ways of overcoming problems that could delay the implementation of compensatory measures for the abolition of border controls.

In real and symbolic terms, the third phase of the Intergovernmental Cooperation began with the constitution of this group. In practical terms the need to improve efficiency stemmed from the fact that the deadline of 1992 was approaching and there was a delay in the adoption of the required measures. Furthermore, the constitution of this group marks the beginning of a slow transition towards the new institutional structure introduced by the Treaty on European Union.

The Coordinators Group was responsible for the coordination of almost all intergovernmental groups working close to the European Community in the areas of internal security and abolition of border controls on persons. It coordinated the work of Trevi(s), AHWGI, MAG, the European Political Cooperation Group and the Horizontal Group. The official name of the group is "Group of Coordinators of Free Movement of Persons". However, this may be misleading because this group coordinated activities that clearly go beyond the measures required for free movement of persons - such as those of Trevi, notably in relation to the fight against terrorism.

The Coordinators Group was formed by high level civil servants from the EC Interior Ministries and a representative of the Commission. It met monthly to analyse reports of the several working groups and to decide which matters should be forwarded to the Ministers' meetings. On the basis of the working groups reports, it prepared six-monthly reports to the European Council meetings at the end of each Presidency.

The first task assigned to the Coordinators Group to produce a report setting out the measures required for the abolition of border controls, specifying those which were indispensable and those which were only desirable. The group adopted this report in Las Palmas (thus it was called the "Palma Document") and it was approved by the European Council in Madrid in June 1989. This document will be examined in more detail below.

With the entry into force of the Treaty on European Union, the work of the Coordinators Group was taken over by the K4 Committee, discussed in chapter 7.

e) Overview of Activities Undertaken in Early Intergovernmental Cooperation Prior to the Treaty on European Union

(i) The "Palma Document", the declaration of Paris and the "Trevi Programme"

A sense of disorganisation prevailed in the activities of the Intergovernmental Cooperation groups before the Coordinators Group was created. The first work of this group was the elaboration of the "Palma Document".[68] This is a report for the European Council with an inventory of the measures required for the abolition of internal border controls, in relation to persons. It distinguishes between indispensable measures and desirable measures and sets out an indicative timetable for their adoption or application. It refers to measures dealt with by several fora, both by Intergovernmental Cooperation groups and EC organs. It mentions the organ or body that should be responsible for preparing each measure.

The "Palma Document" envisaged action in a wide range of areas; at external and internal frontiers; as well as inside Community territory in relation to: combating drug trafficking, combating terrorism, admission to Community territory (visa policy), granting asylum and refugee status, expulsion ("removal"), judicial cooperation in criminal and civil matters and in matters concerning articles carried by travellers, including animals. The report did not deal with positive measures regarding the integration of third country nationals residing in the Union. In this regard, the only reference made was to a "study of the abolition of checks on third country nationals" at internal borders. A vague reference was also made to the desirability of "harmonisation where necessary of laws on aliens in general and immigration in particular". No reference was made to the possibility of extending Community rights of free movement between Member States to third country nationals.

The "Palma Document" was unanimously adopted by the Coordinators Group and unanimously approved by the European Council in Madrid in June 1989.

On 15 December 1989, the Trevi ministers meeting in Paris issued a declaration in which they expressed their determination to develop cooperation in law enforcement and security, whilst rejecting the idea that the Community should be closed to people from outside, and stressing the importance of the freedom of movement of persons. The need for further cooperation was held to derive from the fact that "[t]errorists and professional criminals are increasingly adept at exploiting the limits of competence of national agencies".[69] The development of cooperation was envisaged in four areas: communication and exchange of information (including the creation of a common information system); technical training; liaison officers and frontiers. As far as frontiers are concerned, the declaration envisaged the introduction, at external frontiers, of controls "which will safeguard the interests of all Member States", the allocation in the long term of a

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[68] The *Palma Document* also published in the report of the House of Lords, Select Committee for the European Communities, *1992: Border Control of People*, Session 1988-1989, 22nd report, pp.55-64. It circulated also in the European Parliament - see the annex 1 of Communication No.19/90 to the Members of the Committee for Legal Affairs and Citizens Rights, doc.ref. PE 143.470, DOC_PO/CM/93290.hcb, 28/8/1990, confidential.

[69] Bunyan, T. (ed.) Appendix 6 of *Statewatching...*, op.cit., at p.196.

European level radio frequency "common to all services of public safety", and the framing of bilateral agreements on hot pursuit.[70]

In 1990 the Trevi Group presented its Action Programme,[71] which was a kind of developed version of the "Palma Document" for the security area. The Programme was divided into three chapters: Areas of Cooperation, Methods of Cooperation and Implementation of Cooperation. It envisaged cooperation between police and security services in a wide range of areas, for the Trevi Group on the whole. Those areas included: combating terrorism, drug trafficking and organised crime; the technical and scientific police field and the training of personnel. With regard to combating illegal immigration, it was agreed that "co-operation between the relevant departments shall include in particular the exchange of information to assess the scope of the phenomena: the development of migratory flows, the discovery of clandestine immigration networks, the identification of aliens reported for the purposes of refusal of entry to a Member State and of aliens considered likely to compromise public order, [and] the techniques used in the manufacture of travel documents".[72] Several methods of cooperation were conceived, such as exchanging experts and liaison officers, posting of liaison officers outside the EC, police cooperation in common frontier areas, trans-frontier observation and pursuit rights, and the study of a common information system - designed to collect data and descriptions of persons and objects. As far as control at external frontiers was concerned, the Programme envisaged that "Member States may, by means of special agreements, co-ordinate the deployment of their personnel and facilities and develop the forms of co-operation they consider appropriate. Such co-operation could involve, inter alia, the exchange of officers specialised in immigration problems."[73] Finally, the possibility of extending cooperation to other subjects "concerning public order and internal security" was envisaged.

The Trevi Programme of Action was adopted by the Trevi ministers' meeting of Dublin in June 1990. For a long time, it was the main framework for police cooperation between Member States, although it was not fully implemented.[74]

(ii) Europol

Although the idea had been discussed for quite a while, it was in the European Council meeting of Luxembourg, in June 1991, that the creation of Europol was first proposed by Germany. Police cooperation and Europol were mentioned in the Treaty on European Union[75] and a declaration was annexed to it confirming the agreement reached on the matter in June 1991.

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[70] Idem.

[71] Officially the Action Programme relating to the *Reinforcement of police cooperation and of the endeavours to combat terrorism or other forms of organised crime*, June 1990. This Programme circulated in the European Parliament - see Annex 3 of Communication No.19/90 to the Members of the Committee for Legal Affairs and Citizens Rights, quoted supra.

[72] Paragraph 5 of the Programme, op.cit., p.40.

[73] Paragraph 11 of the Programme, op.cit, p.43.

[74] *Mise en oeuvre du traité de Maastricht...*, p.192.

[75] Article K.1(1)(9).

As a first step to Europol, the Trevi ministerial meeting in Copenhagen, on 1-2 June 1993, signed an agreement on the creation of the Europol Drugs Unit (E.D.U.). It was agreed that the Unit would "act as a non-operational team for the exchange and analysis of intelligence in relation to illicit drug trafficking, the criminal organisations involved and associated money laundering activities affecting two or more Member States."[76] Later, at the Essen Summit on 9-10 December 1994, the remit of the E.D.U. was extended to include nuclear crime, vehicle trafficking (car crime), "crimes involving clandestine immigration networks" and associated money-laundering operations.[77]

The Europol Convention[78] was concluded on 26 July 1995. However, the issue of judicial control on Europol activities has not yet been definitively settled, since the United Kingdom persists in refusing to accord the EC Court of Justice jurisdiction on such activities. Meanwhile, it seems that the national parliaments of some Member States, particularly those of the Benelux are not willing to ratify the Convention without the guarantee that the EC Court of Justice will have jurisdiction on it, including as far as the United Kingdom is concerned.[79]

In a first phase, it is envisaged that Europol will have competence to act in order to prevent and combat, inter alia, "illegal immigrant smuggling" and "trade in human beings".[80] The Council, acting by unanimity, may also instruct Europol to deal with "other serious forms of international crime". One of these types of crimes may be "crime against life, limb or personal freedom", like "racism and xenophobia".[81]

(iii) EIS

The secrecy of the work of intergovernmental groups, like Trevi, required that the exchange of information and communication in general be surrounded by special guarantees of safety.[82] In September 1986, Trevi I decided to created a secure, dedicated fax system to improve communications.[83] Also in 1986, the Police Working Group on Terrorism began installing its own coded fax system. This system was so successful that Trevi decided to install the same equipment throughout its network: the Trevi Secure Fax Network (TSFN). However, the TSFN soon became overloaded. In the mean time the AHWGI also called for a computerised list of "inadmissible aliens". It became clear that there was a general need for a safe system of exchanging information.[84]

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[76] See the text of the agreement in part 3 of *STATEWATCH Eurofile*, No.1, London, Statewatch, 1994. See also *Statewatch*, Vol.3, May-June 1993, No.3.

[77] Article 2(2) of the Joint action 95/73/JHA concerning the Europol Drugs Unit, adopted by the Council on 10 March 1995, on the basis of Article K.3(2)(b) of the Treaty of European Union, OJ L 62/1-3 of 20/3/1995. See also *Statewatch*, Vol.4, November-December 1994, No.6 and Bull.EC, 12/1994.

[78] Convention of 26 July 1995 based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316/2, of 27/11/1995. On this Convention see Bunyan, Tony *The Europol Convention*, London, Statewatch, 1995 (with bibliography).

[79] See *MNS*, July 1995 and *Statewatch*, Vol.5, November - December 1995, No.6, p.5.

[80] Article 2(2), first paragraph, of the Europol Convention, quoted supra.

[81] Idem, Article 2(2), second paragraph, and Annex of the Convention.

[82] For a detailed analysis of the work on police communications between Member States, including the work of the Trevi, the European Information System, the Europol Drugs Unit and the systems of the Schengen Group, see *Police Co-operation in Europe*, op.cit., pp.219-248.

[83] Bunyan, T. "Trevi, Europol and the European State", op.cit., at p.18.

[84] The European Political Cooperation Group has its own system of communications: COREU.

Trevi II tried to address the problem. It worked in police communications on an EC-wide level and in the problems related to communications between Schengen and non-Schengen countries. However, this was not sufficient and a permanent solution for the communications problem was sought in a future European Information System (EIS), to be used for several law enforcement purposes.

The AHWGI, together with Trevi and MAG 92 tried to address the problem,[85] which was also considered by the Coordinators Group. Following this, in the second half of 1992, the technical work on the EIS passed to the Horizontal Group, at the request of the European Council of Lisbon, in June of that year. The Coordinators Group had the responsibility of drawing up a Convention on the use of the EIS.

The EIS has been drawn up using much of the experience of the Schengen Information System and is very similar to it in technical terms.[86] A Convention on the EIS has been in preparation for some years and is now being negotiated under the framework of the Third Pillar of the Union.

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[85] Benyon, John et al. *Police Co-operation in Europe...*, op.cit., p.239 and Bunyan, T. "Trevi, Europol and the European State", op.cit., at p.31.

[86] For a comparison between the Schengen Information System and the European Information System, with reference to the rules on the exchange and use of information, see the paper of Magraner, Ana "Coexistence des différents systèmes informatiques SIS-SIE", presented at the EIPA colloquium "From Schengen to Maastricht", held in Maastricht, on 15-16/12/1994.

2 - Cooperation between some Member States only - Schengen[87]

a) General

The origins of the Schengen Group go back to the Saarbrücken Agreement, signed by France and Germany on 13 July 1984. This Agreement was a vague document, expressing the common will of both countries to abolish the obstacles to the free movement of persons between them. It was a response to a large movement of lorry drivers who, in the Spring of 1984, protested against the long queues of lorries at borders between Member States by blocking the crossing of numerous frontier posts.[88]

This was followed by the Schengen Agreement of June 1985, which involved France, Germany and the Benelux States. This was solely a programmatic agreement which envisaged some technical measures to facilitate the movement of persons and essentially it established a wide list of issues in which the authorities of the respective countries would cooperate. These issues included approximation of laws on visas, coordination of the fight against drug trafficking, irregular entry or residence of persons, smuggling, tax fraud, police cooperation, extradition, international judicial cooperation, harmonisation of laws on arms and explosives, registry of travellers at hotels and "certain aspects of the law on foreigners in relation to nationals of non-member states of the European Communities".[89]

On 19 June 1990, a Convention Implementing the Schengen Agreement[90] was signed by the same parties to the Schengen Agreement itself. To date, ten Member States

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[87] There is an extensive bibliography on Schengen. See, e.g. Blanc, H. "Schengen: le chemin de la libre circulation en Europe" *RMCUE*, 1991, No.351, p.722; Chocheyras, Luc "Les Accords de Schengen", in *Les Accords de Schengen - Quelle Politique Migratoire Pour la Communauté?*, Luxembourg, Institut Universitaire International Luxembourg, 1992, pp.101-146, and "La Convention D'Application de L'Accord de Schengen", *AFDI*, Vol.XXXVII, 1991, pp.807-818; Donner, J.P.H. "Abolition of Border Controls" in *Free Movement of Persons...*, op. cit., p.5; Foblets, M-C, "Europe and its Aliens After Maastricht, The Painful Move to Substantive Harmonization of Member-States Policies Towards Third-Country Nationals", *American Journal of Comparative Law*, Vol.42, 1994, No.4, pp.783-805; GISTI, *Conséquences de l'entrée en vigueur de la Convention de Schengen*, GISTI/FTDA, 1995; Julien-Laferrière, F. "Que négocie-t-on à Schengen? Note sur les accords de Schengen" *Plein Droit*, 1989, No.8; Meijers, H. et al. (eds.) *Schengen: Internationalisation of Central Chapters of the Law on Aliens, Refugees, Security and the Police*, 2nd.ed., Leiden, Stichting NJCM-Boekerij, 1992; Neel, B. "L'Accord de Schengen", *L'Actualité Juridique-Droit Administratif*, October 1991 Oct, No.20, p.32; O'Keeffe, "The Schengen Convention...", *YEL*, op.cit; O'Keeffe, David "Non-Accession to the Schengen Convention: The cases of the United Kingdom and Ireland" in *Schengen en Panne*, Pauly, Alexis (ed.) Maastricht, EIPA, 1994, p.145; Pauly, Alexis (ed.) *Les accords de Schengen: Abolition des frontières intérieures ou menace pour les libertés publics?*, Maastricht, EIPA, 1993; Pauly, Alexis (ed.) *Schengen en Panne*, op.cit.; Philip & Boutayeb "Schengen (Accords de -)" in *Dictionnaire Juridique des Communautés Européennes*, op.cit., pp.981-991; Schermers, H.G. et al. (eds.), *Free Movement of Persons in Europe...*, op.cit.; Schutte, J. E. "Schengen, its Meaning for the Free Movement of Persons in Europe" *CMLRev*, Vol.28, 1991, No.3, pp.549-570; and *The Schengen Agreement: introduction, bibliography and full text*, Statewatch Briefing Paper No.2, London, Statewatch, 1992. See also the Editorial Comments "Schengen: the pros and cons", *CMLRev*, Vol.32, 1995, No.3, pp.673-678.

[88] Cruz, *Schengen, Ad hoc Immigration Group...*, op.cit., p.3.

[89] Article 19 of the Schengen Agreement.

[90] See, e.g., I.L.M., Vol.30, 1991, No.1, p.73.

of the European Union are party to the Schengen Implementing Agreement: Austria, Belgium, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal and Spain.[91]

The Schengen Implementing Agreement developed and materialised the agreement of 1985, providing for the total elimination of border checks between the contracting parties. This objective is to be achieved in two ways: by the reinforcement and harmonisation of controls at the external borders of the "Schengen Area" and by closer cooperation among national polices. The Implementing Agreement envisaged that the Schengen Information System would be the fundamental tool by which to ensure and facilitate these measures. The Schengen Information System is an electronic data-base which lists persons and objects wanted or inadmissible to the Schengen countries. The SIS is composed of a central data-base located in Strasbourg (the Central SIS or C-SIS), and the national data-bases of each member country (each country having its own National SIS or N-SIS). The National data-bases are connected on-line with the Central data base.[92]

The Schengen Implementing Agreement is quite a comprehensive document, covering a very wide range of areas. It includes a considerable number of measures which have been dealt with separately by the Intergovernmental Cooperation groups and even by the Community. For this reason it has been considered as a model for providing solutions which may, in the future, cover all Member States.[93]

The Agreement begins by making a number of relevant definitions in its Title I: e.g. that for the purposes of the Agreement an alien is "any person other than a national of a Member State of the European Communities".[94] Title II relates to the abolition of checks at internal borders and movement of persons. Its provisions deal with crossing internal frontiers, external borders, visas, conditions governing the movement of aliens within the Schengen Contracting Parties, residence permits, reports concerning a person not to be permitted entry, measures relating to organised travel (responsibility of carriers for transporting passengers without the proper travel documents) and responsibility for processing applications for asylum. Title III relates to police and security. It deals with police cooperation, mutual assistance in criminal matters, application of the principle *non bis in idem*, extradition, transfer of the execution of criminal judgments, narcotic drugs, and with firearms and ammunition. Title IV relates to the Schengen Information System and deals with its establishment, its operation and utilisation, the protection of personal data and the security of data under the SIS, and, finally, apportioning the costs of establishing and utilising the SIS. Title V refers to the transport and movement of goods. Title VI establishes further rules on the protection of personal data, notably the obligation of all Member States, before the entry into force of the Agreement, to "adopt the national provisions required to achieve a level of protection of personal data at least equal to that resulting from the principles of the Council of Europe Convention of 28 January 1981 for

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[91] See infra for a reference to the present situation of Austria and the Scandinavian countries as far as the Schengen Agreements are concerned.

[92] For a detailed overview of the SIS's functioning see Benyon, John et al. *Police Co-operation in Europe...*, op.cit., pp.228-237.

[93] See, O'Keeffe, "The Schengen Convention...", op.cit., in particular at pp.217-219.

[94] Article 1.

the protection of individuals with regard to automatic processing of personal data."[95] Title VII refers to the Schengen "Executive Committee" and Title VIII contains the final provisions of the Agreement, establishing, for example, that the Agreement is subject to Community Law and to the UN Conventions on Refugees.

Within the framework of the Schengen group, a readmission agreement of illegal immigrants was signed with Poland. In relation to some Schengen States, the Agreement was entered into force prior to the entering into force of the Schengen Implementing Agreement.[96]

b) Structure

At present, the structure of Schengen is quite complex. The highest level of responsibility lies with the Ministers and Secretaries of State of the Schengen countries, who make up the "Executive Committee", provided for by Title VII of the Schengen Implementing Agreement, and which is the highest Schengen authority. The Committee meets each six months. Below the Executive Committee, is the Central Negotiations Group, which has practical responsibility for all Schengen working groups and ad hoc committees.

There are four main Schengen working groups. Working Group I deals with police and security matters. It includes sub-groups on the harmonisation of national laws on controls on weapons (FIREARMS), on telecommunications in general (TELECOM), on radio frequencies for police use (FREQ) and a sub-group of legal experts (EX JUR), which was responsible for drafting the Schengen Implementing Agreement. Working Group II deals with problems more directly related to the movement of people and external border controls. It has four sub-groups. One developed a COMMON HANDBOOK for officials at external frontiers posts. Another deals with issues related to ASYLUM. A third sub-group works on VISAS and on issues related to documentation, forged documents and passports. A final sub-group prepares READMISSION agreements with non-Schengen countries. Working Group III deals with matters related to transport, which, by the way, are also addressed in the official Community framework. Finally, there is the Working Group IV which works on matters related to customs and movements of goods, including problems related to agricultural products and their transportation. It has four sub-groups: on PUBLIC HEALTH in general, on agricultural products (PHYTOSAN), on Environment and on customs affairs (COCOM).

A fundamental Working Group in Schengen is ORSIS. This group is responsible for the general ORientation of the Schengen Information System. It has several sub-groups dealing with different parts of the SIS, or aspects of its use. These sub-groups are as follows. One is responsible for SIRENE (Supplementary Information Requested at National Entries). The purpose of this information system is to enable the exchange of information necessary for the preparation, or for following-up, of a certain action, which is to be requested or was already requested. It also allows for broader police

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[95] Article 126 of the Schengen Implementing Agreement. The Convention of the Council of Europe was published in ETS, No.108. It was ratified by 16 countries, including Iceland, Norway, Slovenia and all Member States, except Greece and Italy.

[96] Published in *Schengen: Internationalisation of Central Chapters of the Law on Aliens* ..., op.cit., at pp.215-7.

communications.[97] Another sub-group works on VISION (the Visa Inquiry System in an Open-Border Network). This is the system for exchanging information on visa applications and visa issues. It allows for consultations between the Member States as provided for by Article 17(2) of the Schengen Implementing Agreement. Further sub-groups are SINFONE (SIRENE Information Network) and CODEX (Conference on Data Experts). Under ORSIS there is also the sub-group PMT (the Project Management Team), and PWP (the Permanent Working Party).

Several other working groups operate in the Schengen framework and report to the Central Group. There is a "Permanent Administrative Committee" and other working groups dealing with specific subject matters. Among the latter is STUP (stupefacients), working on the handling of legal and illegal narcotic drugs; and there are the Working Groups dealing with TREATIES AND REGULATIONS (working on relations with the Dublin Convention and Community Law, preparation of readmission agreements, and new accessions), AIRPORTS and EXTERNAL FRONTIERS.

c) Schengen future: enlargement or absorption by the Union?

According to the Final Act of the Schengen Implementing Agreement, the practical implementation of the Agreement depended on the fulfilment of certain conditions: namely that "checks at external borders are effective". On several occasions, a date for initiating the implementation of the Agreement was set out. However, the required conditions were not met and the implementation was repeatedly postponed. Some technical problems with the Schengen Information System contributed to these delays, but there were also some political problems. Because of its reluctance to withdraw its border controls, the French government is generally regarded as having delayed the implementation of the Agreement. This is thought to have been due to perceived difficulties on the part of the French authorities in the control of illegal immigration as well as to the Dutch liberal policy on drugs.

Finally, in 26 March 1995, the Schengen Implementing Agreement began to be applied between Germany, France, the Benelux countries, Spain and Portugal. Some technical and legal problems have already arisen from its application. However, for the time being they seem to be of secondary importance and do not seem likely to block the general implementation of the Agreement.

Italy and Greece, which are also parties to the Agreement, have not yet begun to apply it. In the case of Greece, this seems to be due to problems in the control of Greece's borders, namely in the Mediterranean. In Italy the problem seems to revolve around technical difficulties (there is a delay in setting up the Italian N-SIS) and the fact that Italy does not have a law on the protection of personal data. According to Pastore, this is due to the lobbying efforts of several Italian enterprises, that presently treat personal data without any limits regarding the privacy of the concerned persons, and have an interest in maintaining the present status quo - i.e. virtually a total absence of rules.[98]

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[97] Note that due to the rapid growth of demands for exchanging police and immigration information, at the meeting of the Schengen Committee in Brussels on 28 April 1995, a second communications network between the Schengen Countries was created. It is called SIRENE Phase II.

[98] See Pastore, M., "Frontiere aperte ma non per noi", *ASPE*, Year XIV, No.7, 13/4/1995, p.12.

France has also continued to raise problems.[99] Following the explosion of bombs from the Summer of 1995 onwards, France has made recourse to Article 2(2) of the Schengen Implementing Agreement. This provision allows for the "temporary" replacing of controls at the national borders of a Member State, on the grounds of public order or national security. However, the temporary character of such controls has in practice been questioned by the high officials of the French government. They have made it clear that for now, controls at French borders will be made for an indefinite period.[100]

The Schengen Group is likely to expand in the future. For a long time it has had contacts with non-signatory countries. Apparently, the Schengen countries put pressure[101] on Austria, Finland, Norway and Sweden to join Schengen when they entered the Union. Switzerland has also indicated a willingness to have working ties with Schengen. As far as Austria is concerned, it formally joined the Implementing Agreement on 28 April 1995. However, it still has some work to do before being able to abolish border controls with other Schengen members. Moreover, the ratification of the Austria's accession by the national Parliaments of other Member States is likely to take some time.

As far as Sweden, Finland and Denmark[102] are concerned, lately they have shown interest in joining the Schengen group. However, these three countries would prefer their participation in the Schengen system not to affect the Scandinavian passport-free zone - which also includes Norway and Iceland. Norway seems interested in participating too, but the Schengen Implementing Agreement is only open to Member States of the European Communities.[103] Alternatives to the formal accession of Norway and Iceland to the Schengen Implementing Agreement, could be a parallel Convention to Schengen, special bilateral arrangements, or further developing the rules on free movement of persons within the European Economic Area.[104] On 16 June 1995 an agreement was reached with the Nordic Union which will allow Norway and Iceland to become associate members. They will be allowed to join the Schengen "acquis", but will not be able to participate in Schengen itself. They will not participate, for example, in the Schengen Executive Committee.[105] Later, in their meeting of 20 December 1995, the Schengen

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99 For an account of some legal difficulties in France see *Le Monde*, 8/4/1995. There are also some problems related to the reluctance of France in applying all Schengen rules, namely those regarding the right of hot pursuit by non-French police. See *MNS*, 5/1995.

100 See *The European*, 21-27 December 1995.

101 Or invitated them, depending on who tells the story.

102 On the criteria Denmark has to meet to join the Schengen Agreement, see "SCHENGEN Checklist given to Denmark" in *Statewatch*, Vol.5, January-February 1995, No.1.

103 Article 140 of the Schengen Implementing Agreement.

104 *The European*, No.259, 28/4-4/5/1995. See also Statewatch, Vol.5, March-April 1995, No.2, which quotes the Danish Presidency report agreed by the Prime Ministers of the Nordic Union meeting in Reykjavik on 27 February 1995. That report called for: "a Nordic arrangement with the Schengen Cooperation so as not to create new borders within or between the Nordic area and the rest of Europe". The report recalled that for a long time the Nordic Union cooperated against crime, drugs and illegal immigration and maintained that the checks carried out by Nordic countries at their external borders match those of the Schengen countries. Thus, the Prime Ministers agreed in that meeting that Denmark, Sweden and Finland would only apply for Schengen membership if Norway and Iceland were also admitted. See also the *Information note on Nordic Passport Union*, Ad Hoc Group on Immigration, 15/5/91, SN 2245/91.

105 See *Statewatch*, Vol.5, July-August 1995.

ministers agreed in principle to allow Denmark, Finland and Sweden to join the Agreement and pledged to start negotiations as soon as possible. It was also decided to grant Finland, Sweden, Norway and Iceland, observer status from 1 May 1996. Denmark already had observer status.[106]

It is too soon to say whether all Member States, including the United Kingdom and (thus) Ireland, will one day be part of the Schengen group. What may also happen is that EU-wide structures, e.g. the European Information System and the External Frontiers Convention, will provide a framework which may come to resemble the provisions of Schengen. Thus, in practice, it may not make much of a difference whether the remaining Member States formally accede to the Schengen group, or simply accept EU-wide structures and solutions similar to those of Schengen.[107]

As explained in chapter 1, this dissertation will not make a very detailed analysis of the Schengen Agreements and of the legal issues they raise for third country nationals in the European Union. Nevertheless, given their considerable practical importance, Schengen rules and practices will often be mentioned when the corresponding rules and activities developed by all Member States are examined in the following chapters.

3 - Assessment of intergovernmental cooperation prior to the Treaty on European Union[108]

a) Efficiency: the work and the results

The work of the Intergovernmental Cooperation groups has not always lived up to the ambitious aims of their founders. One of the reasons usually given for the Intergovernmental Cooperation's lack of efficiency is the proliferation of working groups dealing with the same subjects, or with closely related aspects of the same subjects. Overlapping and loopholes were inevitable.[109] This was also due to the fact that they

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106 Idem.

107 An exception here is the possible insistence by the United Kingdom on retaining its border controls with other Member States, while applying Union measures and rules, e.g. as far as the reinforcement of external border controls is concerned.

108 See Benyon, John et al., *Police Co-operation in Europe...*, op.cit., pp.146-151(on Schengen) and pp.165-168 (on Trevi, cf. with pp.131-133, which assesses Interpol); Bunyan, T. "Trevi, Europol and the European State", op.cit., p.23 (on Trevi) and pp.32-33 (in general); Bunyan, T. & Webber, Frances *Intergovernmental Co-operation...*, op.cit., pp.31-33; Cruz, *An insight into Schengen, Trevi and ...*, op.cit., pp.5-6 (on Schengen) and 11-12 (on the Executive Committee of Schengen and the jurisdiction of the European Court of Justice on Schengen); Curtin, D. & Meijers, H. "The principle of open government in Schengen and the European Union: Democratic retrogression?", *CMLRev*, Vol.32, 1995, No.2, pp.391-442, at 403-416 (on "Openness and Schengen"); the European Parliament's Piquer report on cooperation in the field of justice and internal affairs under the Treaty on European Union, of 1 July 1993, doc.ref. A3-215/93, at pp.11-12; O'Keeffe, "The Schengen Convention...", op. cit., pp.185-219; and *Mise en oeuvre du traité de Maastricht...*, p.197 (on the proliferation of ad hoc working groups). On police cooperation see Den Boer, Monica "European policing after 1992", *JCMS*, Vol.31, 1993, No.1, pp.3-28, and her "Europe and the Art of International Police Co-Operation: Free Fall or Measured Scenario?", in *Legal Issues of the Maastricht Treaty*, O'Keefe, David & Twomey, Patrick (eds.), London, Chancery, 1994, pp.279-291, in particular at 289.

109 See Cruz, *Schengen, Ad hoc Immigration Group...*, op.cit., pp.14 and 28, footnote 36, and p.14. See also the memorandum of evidence of the UK Immigration Law Practitioners' Association submitted to the

lacked the coordination necessary to achieve global efficiency. The working groups that aimed to overcome this problem were not entirely capable of ensuring such coordination.

In any case, the results of the Intergovernmental Cooperation differ among its various working groups and even among sub-groups of the same group. For example; the results of Trevi I, on cooperation against terrorism, are usually regarded as being quite satisfactory. As to Schengen, it certainly managed to set up a rather sophisticated system of control of the movement of persons. However, it took a very long time to do so, even considering the important technical and political difficulties that it had to address. In relation to the Ad Hoc Working Group on Immigration which existed for 7 years (from the end of 1986 to the end of 1993), none of the instruments adopted or drafted by it presently has binding legal force.

Nevertheless, even in this case it would be inaccurate to draw a completely negative picture of its work. First, the AHWGI has adopted decisions, which, although not having a binding legal force, have been implemented in practice by the EC governments. The United Kingdom, for instance, applied the concept of safe third country (country of first asylum) after it was agreed within the AHWGI - i.e. from 1990 onwards, three years before it was enshrined in national legislation.[110] Secondly, the AHWGI prepared most of the work on common measures and the harmonisation of national laws in the field of free movement of persons within the Union and immigration from third countries. A considerable part of the work now being developed in this field under the Third Pillar of the Union is in fact a continuation of the work of the AHWGI. However, since the lack of efficiency of the Community decision-making process was one of the crucial reasons given for choosing the Intergovernmental Cooperation to deal with immigration related matters, the least that can be said is that the Intergovernmental Cooperation did not prove to be much better than the Community framework in ensuring agreement among all Member States on such sensitive issues.

Furthermore, as far as Schengen is concerned, it is important to note that the methods and legal solutions used by the Schengen group have frequently served as a model for non-participating countries. In the legal field, some solutions of the readmission agreement between the Schengen States and Poland have inspired the draft of readmission agreements among other countries. In the technical field, one example of Schengen influence is the fact that the new computer system of the British Police (PCN2) uses the same software as the Schengen Information System.[111]

b) Functioning methods and democracy

The working methods of the Intergovernmental Cooperation groups lacked general transparency and democratic accountability.[112]

Home Affairs Committee in the framework of an inquiry into migration controls at the external borders of the European Community, *INLP*, Vol.6, April 1992, No.2, pp.48-52.

[110] See Bunyan, T. & Webber, Frances *Intergovernmental Co-operation...*, op.cit., at p.31.

[111] Bunyan, T. "Trevi, Europol and the European State", op.cit., at p.36, footnote 58. Note also that in April 1995 the British Prime Minister John Major announced that his government plans to introduce identification cards in Britain.

[112] The past tense is used because almost all Intergovernmental Cooperation between Member States is now carried out under the framework of the Union, and thus will be examined in the next chapter.

The intergovernmental groups developed their work in highly secretive ways. Usually the content of their decisions and draft decisions was only made public when they were adopted. This situation reached a somewhat unacceptable and ridiculous point when even the full content of the decisions taken was not made public. As Bunyan & Webber recall:

> "There may be (...) measures and agreements discussed in ministerial meetings and implemented by police and immigration officials, of which we were unaware. As it is, the measures we know about usually come to our attention when it is too late to change them."[113]

The lack of information may have derived from an understandable concern for security. However, while such concern may have been justifiable in fields like cooperation against terrorism, it hardly seems justifiable in most of the decisions on immigration and asylum matters. Most frequently it appears that the lack of information simply derived from the will to act without public discussion and consequent possible criticism. This is certainly hard to justify in a democratic society.

Nevertheless, as Cruz rightly points out in relation to Schengen, sometimes the problem was not that the relevant information was not available, but that there was not enough interest shown by the media or the relevant associations concerned with the work of the intergovernmental groups.[114] Nevertheless, the most important point from a structural perspective is the way in which decisions are prepared and taken. The decision-making procedure used by intergovernmental groups is open to severe criticism because of the lack of proper information made available to the public.

The decision-making procedure of the Intergovernmental Cooperation groups may also be criticised for its lack of adequate democratic accountability. In this regard it may be recalled that the doctrine of the separation of powers was fundamental to the creation of the modern State in Europe. Executive, legislative and judicial powers are supposed to be separate, at least as a general rule. In the Community framework, the dominance of the Council (composed of representatives of EC governments) and the relative lack of powers of the European Parliament already goes against that principle. However, the functioning methods of the Intergovernmental Cooperation groups depart still further from that principle. They lack the usual democratic characteristics of equivalent activities at the national level. In most cases, the work of the Intergovernmental Cooperation groups gives civil servants a privileged access to decision-making without having adequate parliamentary accountability or judicial control.

Another important aspect to be stressed is that the European Parliament did not participate in the Intergovernmental Cooperation and was not properly informed of its activities.[115] The same applies to national Parliaments, with a few exceptions.[116] The

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However, the situation described and analysed in the text still persists for Schengen and also for other remaining working groups in which all EC States participate (on terrorism, e.g.).

[113] See Bunyan, T. & Webber, Frances *Intergovernmental Co-operation...*, at p.31.

[114] As far as Schengen is concerned see on this point: Cruz, *Schengen, Ad hoc Immigration Group...*, op.cit., pp.5-6.

[115] Cruz recalls also that, following MEP's protests and several Parliament resolutions, the Ministers of the Foreign Affairs of the Twelve decided on 7 May 1990 to initiate a procedure of contact with the European Parliament. This included a meeting every six months between the president-in-office of the Ad Hoc Working Group on Immigration and the chairpersons of the European Parliament committees

participation of parliaments in the decision-making process is not only a guarantee of democracy in itself. It is also a way of ensuring that the draft measures will be made known to and discussed by the general public. This is a very important factor in favour of the participation of the European, or national parliaments in the preparatory phases of the adoption of decisions by the Intergovernmental Cooperation groups.[117]

Another important point is that the European Court of Justice had no jurisdiction in relation to the decisions of the Intergovernmental Cooperation groups.[118] Neither was there a unique judicial authority with jurisdiction over the decisions or activities of the intergovernmental groups.

As far as Schengen is concerned, the powers of its "Executive Committee" established by the Schengen Implementing Agreement have been much criticised. According to Article 131 of that Agreement, the purpose of the Committee is to ensure that the Agreement "is implemented correctly" and for that purpose it takes the necessary measures, deciding by unanimity.[119] Such wide powers were criticised by several official entities, notably by the Council of States of Netherlands and Belgium, the French and Italian Senates and the French Constitutional Council.[120]

The role of the European Commission in the work of intergovernmental groups may also be recalled here. That role differed according to the various groups. The Commission participated as a member in the ministerial meetings of the Ad Hoc Working Group on Immigration, which functioned under its coordination. In relation to Trevi, the

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concerned. See Cruz, *Schengen,Ad hoc Immigration Group...*, op.cit., p.25, footnote 2. Nevertheless, the European Parliament was not satisfied with this and continued to approve resolutions criticising the Intergovernmental Cooperation.

[116] As far as Schengen is concerned, on the occasion of the ratification of the Schengen Implementing Agreement, the Dutch and Belgian parliaments obtained the right to be given all draft decisions of the Schengen Executive Committee, and to object to them within a period of two weeks. A similar right was proposed within the German Parliament, but was rejected. See *Statewatch*, Vol.5, July-August 1995, No.4. In more general terms, on the role of national parliaments in the Community and Union decision-making process, see, e.g., the short but instructive overview made in chapter 6 of *Mise en oeuvre du traité de Maastricht...*, at pp.401-468, in particular pp.412-414, 418-420, 431-432 and for a summary pp.461-466.

[117] For Schengen see the interest account made by Cruz, *Schengen, Ad hoc Immigration Group...*, op.cit., p.6.

[118] Except if they overlapped with Community Law, but to the knowledge of this author there was no case submitted to the European Court of Justice in which the measures or activities of the Intergovernmental Cooperation groups were at stake. They are only indirectly at stake in case C-445/93, Parliament v. Commission, abstract of the Parliament's petition in OJ C 1/12 of 4/1/1994.

[119] Article 132(2) of the Schengen Implementing Agreement. This Article adds that the Committee "shall draw up its own rules of procedure". The rules of procedure of the Executive Committee of Schengen were adopted on 18 October 1993 and later modified in Paris on 14 December 1993 and include 15 Articles. They are contained in the Schengen document: SCH/Com-ex (93) 1, Rev. 2, Paris, 14/12/1993. For a critical analysis of them see by the Standing Committee of Experts on international immigration, refugee and criminal law, "Schengen: Rules of Procedure of the 'Executive Committee' ", doc.ref.CM193-207, published in the documents for the *Seminar on judicial and parliamentary control of European rules concerning refugee and immigration law*, Brussels, 14 January 1994, pp.41-52.

[120] Cruz, *Schengen, Ad hoc Immigration Group...*, op.cit., p.11. See also p.12 for an eventual solution of the problem of the excessive powers of the Committee. See also the full text of the opinion of the Dutch Council of State on the Schengen Agreement in part 20 of *STATEWATCH Eurofile* No. 1, London, Statewatch, 1994.

European Commission took part in Trevi 92 from the beginning of 1991.[121] A representative of the Commission was present for the first time in a Trevi ministerial meeting in June 1991, when the work of Trevi 1992 was discussed. Subsequently, until the entry into force of the Treaty on European Union, a Commission representative was always present in the Trevi six-monthly ministerial meetings.[122] As referred to above, from the beginning of 1992 onwards, representatives of the Commission attended, as observers, the meetings of the senior officials of the Trevi group, following a long insistence by the Commission that it should have the right to do so.[123] As regards the Dublin Convention, Article 18(1) thereof provides for the participation of the Commission as an observer in the discussions of the Committee set up to coordinate its implementation. Likewise, the Commission can also participate in the working parties of the same Committee. Finally, the Commission was and still is an observer in the ministerial meetings of the Schengen Group,[124] although its participation in the Schengen Executive Committee is not envisaged by the Implementing Agreement.[125]

In any case, the role of the Commission in the various intergovernmental groups was quite secondary. This was the case even in the AHWGI, because the major initiatives were usually taken by the Member States, particularly by those holding the group's presidency. Not having the exclusive right of initiative, the Commission had little bargaining power. Thus, the Commission's participation in the work of the Intergovernmental Cooperation, besides a purely informative interest, served mainly to provide technical assistance.

Finally, an important point must be recalled in relation to the work of the Intergovernmental Cooperation. It was not concerned with positive measures for third country nationals.[126] It was concerned with limiting immigration from third countries, as part of a more general concern with fighting crime and guaranteeing security in the Member States. There were no similar European institutions or Member States cooperation groups working positively in favour of third country nationals.

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121 Bunyan, T. "Trevi, Europol and the European State", op.cit., at p.20.

122 General Reports on the Activities of the European Communities of 1991 and 1992 and Bull.EC, 6/1993 point 1.4.19.

123 See Bunyan, T. in "Trevi, Europol and the New European State", op. cit., p.15 at p.34, footnote 5.

124 See the answer given by Lord Cockfield on behalf of the Commission in 22 February 1988 to the Written question of James Ford, No.2004/87 of 10 January 1988 (88/C 195/26):"The Commission takes part as an observer in the ministerial meetings organised by the Schengen group. It is informed in its capacity of the work carried out to implement the Schengen Agreement and studies closely any measures planned. However, no concrete proposals have so far been made on the measures announced by the Schengen Group in the areas referred to by the Honourable Member [immigrants, refugees or exiles]." See OJ C 195/14 of 25/7/1988.

125 However, note that the EC Commission is to be allowed to be present at the Committee meetings.See Cruz, *Schengen, Ad hoc Immigration Group...*, op.cit., p.27, footnote 31.

126 On this topic, as far as the Schengen system is concerned, see *Frontier law: Why Schengen isn't working for Europe's third country nationals*, London, Immigration Law Practitioners' Association and the Joint Council for the Welfare of Immigrants, September 1995.

CONCLUSION

The assessment of Intergovernmental Cooperation must be, on the whole, negative, with some reservations.

Some of the areas in which the Intergovernmental Cooperation operated (notably those concerning free movement of persons and third country nationals) could be dealt with under the Community framework, as has been argued in chapters 2 and 3. Among such areas are the areas related to the abolition of border controls on persons, for example areas related to immigration and immigrants from third countries. However, the Council can only act on Commission proposals and the latter had not presented proposals on those areas. Thus, judicial action against Intergovernmental Cooperation had to begin by questioning the Commission's failure to act and this was made by the European Parliament. It was suggested that Article 5 could be useful to justify why and to what extent Member States should not engage in Intergovernmental Cooperation to respect Community competence, in particular if the Commission decided to try to make the Community exercise its competence in those areas. It was also submitted that in the case of conflict between a rule produced by the Intergovernmental Cooperation and a positive and substantive rule enacted by a Community institution, the latter has primacy - at least from the point of view of Community Law.

Subsequently, this chapter made a detailed reference to the several ad hoc working groups preparing compensatory measures for the abolition of internal border controls. Such reference was intended to highlight how the concern with immigration matters was integrated into the general concern of the Member States on security problems. Furthermore, it showed the nature of the proliferation of intergovernmental groups. Their proliferation and the lack of effective coordination of their work have surely contributed to their relative failure.

Up to now, no legally binding instrument prepared by intergovernmental groups has entered into force, except for the Schengen Implementing Agreement, which does not apply to all Member States. Thus, it appears that the Intergovernmental Cooperation was not more effective than the Community framework to achieve agreement among all Member States on the sensitive matters at stake here.

Still, a negative assessment of the efficiency of the Intergovernmental Cooperation is mitigated by some important facts. First, by the considerable practical influence of the (non-binding) decisions of the ad hoc working groups. Secondly, by the long term importance of the activities developed under the Intergovernmental Cooperation framework. A substantial part of such work (namely the study of the relevant problems and the search for possible agreements between Member States) is valid in and of itself and had to be done in any case. Some of this work is also at the origin of the work currently being developed by the Third Pillar of the European Union.

However, the Intergovernmental Cooperation may be criticised in other aspects. The functioning of the intergovernmental groups lacked transparency, adequate parliamentary accountability and a uniform judicial control. Usually, secrecy surrounded the activities of the intergovernmental groups, and often even their very decisions. This clearly seems to be unacceptable in a democratic society. Moreover, the European and

national parliaments often received insufficient information on such activities and decisions and thus could not control them in a proper manner. Furthermore, there was not a unique judicial authority with jurisdiction over the decisions or activities of the intergovernmental groups. Finally, the participation of the Commission of the EC's in the work of the intergovernmental groups, in matters so closely related to the establishment of an internal market, was of quite secondary importance, when it existed at all.

During the intergovernmental conferences that led to the conclusion of the Treaty on European Union, there was hope that this situation could be changed. The extent to which change was accomplished will be seen in the next chapter. Within the examination of the Treaty on European Union, the next chapter will also further develop the analysis of some negative aspects of the functioning of the Intergovernmental Cooperation, notably its lack of transparency and of uniform judicial control.

For now, it is important to emphasise that, to a significant extent, the activities of the Intergovernmental Cooperation constituted a Community job performed in another framework. This mainly refers to activities relating to the free movement of persons (including the abolition of internal border controls) and the legal status of third country nationals.

Moreover, the Intergovernmental Cooperation was not a good example of an efficient, transparent or democratic decision-making process. Finally, it was not meant to improve the position of third country nationals in the Member States. Its objective had generally a repressive character: to control crime and immigration.

Chapter 7

THE NEW LEGAL AND INSTITUTIONAL FRAMEWORK INTRODUCED BY THE TREATY ON EUROPEAN UNION

INTRODUCTION

This chapter analyses the new legal and institutional framework introduced by the Treaty on European Union and that is of relevance for third country nationals.

This Treaty created a "European Union" formed by the so-called "three pillars". The "first pillar" corresponds to the old European Communities - including the "European Coal and Steel Community", the "European Atomic Energy Community", and the "European Community". The latter is the new name for the old European Economic Community. The "second pillar" corresponds to the "Common Foreign and Security Policy" and the "third pillar" to the "Cooperation in the Fields of Justice and Home Affairs".[1]

The aspects of the Treaty on European Union that concern mostly third country nationals will be analysed in the following order.

In Section A an historical note will be made. It recalls the proposals related to third country nationals that were on the table of the Intergovernmental Conferences leading to the conclusion of the Treaty on European Union. The objective of this historical note is to contribute to the understanding of the intentions of the Treaty drafters, and to make clear how the final outcome was a compromise between diverging positions.

Section B examines Title VI of the Treaty on European Union. It created the "third pillar" of the Union, by providing a framework for "Cooperation in the Fields of Justice and Home Affairs". It is predominantly under this Title that the European Union is supposed to address issues concerning third country nationals. First, this section will refer to the scope of the activities to be developed under Title VI. Secondly, it will deal with the types of activities to be undertaken and the decision making-process to be used. As far as the activities are concerned, the legal nature of the instruments to be adopted will be examined. In what regards the decision making-process two points will be analysed. One concerns the procedures to be used and the position of the different institutions therein. The other concerns the important issue of transparency in the institutional functioning of this framework. A third part of this section will deal with some legal limits established by the Treaty on European Union itself to the activities developed under its Title VI. The limits to be examined are the respect of fundamental human rights and the Member States' responsibilities "on law and order and the safeguarding of internal security". A fourth part of this section will deal with the *judicial deficit* in Title VI. Here I refer to the lack of a uniform judicial control on the activities developed and instruments adopted under Title VI, which is essentially derived from the lack of obligatory jurisdiction of the Court of Justice. A fifth part of this section explains the intermediate structure of decision making and law enforcement of Title VI. A sixth part examines the relations between Title VI and the European Community. A subsequent part deals with Article K.7 and with the relations between Cooperation developed under Title VI and other types of intergovernmental cooperation developed outside the Treaty on European Union. Finally, a general assessment of Title VI will be made.

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[1] The "Common Foreign and Security Policy" and the "Cooperation in the Fields of Justice and Home Affairs" were established by Title V and Title VI, respectively, of the Treaty on European Union.

Section C of this chapter deals with the amendments made by the Treaty on European Union to the Treaty of Rome which are of relevance for third country nationals. It will analyse the new Article 100C, with particular attention being given to the precise definition of its material scope. Furthermore, section C deals with the Protocol and Agreement on Social Policy, and with the provisions establishing Union Citizenship. Finally, a reference will be made to the changes introduced by the Treaty on European Union to some Community procedures for decision-making.

In this chapter I will not develop issues treated in other chapters, like the ad hoc intergovernmental cooperation between Member States (previous to the entry in force of the Treaty on European Union). This was dealt with in the previous chapter. Thus, references to this topic will be limited to what may be helpful in analysing the provisions of the Treaty on European Union itself. The same holds for the European Union activities already developed under the framework of Title VI. Some of these will be analysed in the next chapter, chapter 8. The next chapter analyses the activities of the European Union in the field of immigration policy: control of persons at the Union external borders, admission of immigrants to a Member State, and action against illegal immigration (including expulsion of illegal immigrants).

The present chapter analyses the provisions of the Treaty on European Union which are of relevance to third country nationals living in the Union. These provisions do not usually constitute substantive rules of law, but mainly establish a legal framework of competences and procedures to act on issues concerning those persons.

A) INTRODUCING THE TREATY ON EUROPEAN UNION

- A HISTORICAL NOTE

On 7 February 1992, after hard negotiations, the representatives of the Member States of the European Communities signed in Maastricht the final draft of the Treaty on European Union. Then followed the ratification procedures, a protracted and sometimes dramatic process. This included the "No" vote in the first referendum in Denmark, the narrow "Yes" in the one in France, and the complex difficulties involved in the parliamentary ratification in the United Kingdom. Finally, after some other difficulties and another (positive) referendum in Denmark, the Treaty entered into force on 1 November 1993.

Presented as a "new stage in the process of creating an ever closer union among the peoples of Europe",[2] the Treaty on European Union represents the third big step in the process of European integration - after the Communities' founding treaties and the European Single Act. The limited progress it represented was the fruit of the general political and economic situation prevailing in Europe.

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[2] Article A, second subparagraph.

As a logical development of the 1992 project, the Treaty is quite ambitious in the economic area. The "irrevocable" objective of having by 1999 a common currency is certainly the most important novelty of this Treaty. With that aim, common targets, detailed rules and new institutions are established. Furthermore, Community competences are enlarged in several fields and institutional changes are made. These give more power to the European Parliament and facilitate decision making in the Council.

However, provisions in other areas, also important for establishing a complete internal market, do not compare with the daring changes in the economic and institutional fields. As far as free movement of persons is concerned, progressive changes have been very limited. Immigration policies and the legal status of third country nationals are to be dealt with under the heading "Cooperation in the Fields of Justice and Home Affairs". The Community may only act on some specific aspects of issues concerning visas.

The following sections will analyse the rules of the Treaty on European Union relevant for issues concerning third country nationals in the Union. But before that it may be useful to recall some of the proposals presented to the Intergovernmental Conferences that led to the conclusion of that Treaty.[3] This may facilitate the understanding of the intentions of the Treaty drafters, and make clear that the final outcome was a compromise between contrasting positions.

One of the early proposals concerning immigration matters was included in a joint letter of 6 December 1990, which was addressed by President Mitterrand and Chancellor Kohl to the Italian Presidency. It suggested that:

> "Certain issues that are currently handled in an intergovernmental framework could enter the scope of the Union: [such as] immigration, visa policies, right of asylum(...). Consideration could be given to setting up a Council of Interior and Justice Ministers."[4]

To some extent this idea was later re-iterated by the "Non-Paper" of the Luxembourg Presidency, presented in 12 April 1991. It proposed the inclusion in the Treaty of Rome of a special Title with "Provisions on cooperation on home affairs and judicial cooperation". Article A therein stated that Member States:

> "(...) shall regard the following areas as matters of their common interest:
> (a) controlling the crossing of the external borders of the Member States;

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[3] For an historical overview of the negotiations in the Intergovernmental Conference leading to the Treaty on European Union see Gialdino, C.C., *Il Trattato di Maastricht sull' Unione Europea - genesi, struttura, contenuto, processo di ratifica*, Rome, Istituto Poligrafico e Zecca dello Stato - Libreria dello Stato, 1993. For the most important working documents of the Intergovernmental Conference see Corbett, Richard, in *The Treaty of Maastricht - From conception to ratification: a comprehensive reference guide*, Essex, Longman, 1993, at pp.219-379; and Laursen, Finn & Vanhoonacker, Sophie *The Intergovernmental Conference on Political Union - Institutional Reforms, New Policies and International Identity of the European Community*, Maastricht, EIPA, 1992.

[4] They added that "[t]he new treaty could include a new provision allowing the transfer to the union of new powers to take action, on a decision by the European Council by means of a clear majority vote in Parliament". See the Joint letter of 6 December 1990 with a Memorandum to the Italian Presidency, completing their letter of 19 April 1990 to the Irish Presidency, in Laursen & Vanhoonacker, *The Intergovernmental Conference on Political Union...*, op.cit., at p. 313.

(b) authorised entry, movement and residence on the territory of the Member States by nationals of third countries (in particular conditions of access, visa policies, asylum policies)".

This was supposed to be done for

"the purposes of achieving the objectives of the Union, as a result of the free movement of persons and the establishing of Union citizenship, and without prejudice to the powers of the European Communities".

Subsequent provisions provided for information, joint action and adoption of draft Conventions to be recommended for adoption to the Member States, similarly to the final version of the Maastricht Treaty.[5] However, in the Luxembourg's "non-paper" the extension of Community competence to any of the matters referred to was not envisaged.[6]

Later on, the Dutch presidency presented a draft Treaty "Towards European Union", on 24 September 1991. It proposed to grant the Community competence on entry and movement of third country nationals in the territory of the Member States. It left for cooperation between Member States the harmonisation of rules on residence of third country nationals in a Member State. It proposed the addition of a new Article 100A bis in the EC Treaty, providing that:

"For the purposes of achieving the internal market, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt the necessary measures concerning the entry into and movement on the territory of the Member States of nationals from third countries".

However, a note of the presidency on this Article already stated that it proposed "drawing up new proposals on the subject, in the light of discussions to be carried out within the Intergovernmental Conference".

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[5] The sole exception was the lack of reference in the Luxembourg's "Non-Paper" to adoption of "joint positions", which are provided for in the Treaty on European Union. Note, meanwhile, that the expressions "joint positions" and "joint actions" are not an original idea of the Treaty on European Union. They are already mentioned by the Solemn Declaration on European Union, adopted by the Stuttgart European Council of 19 June 1983, when it reaffirmed the objective of strengthening and developing European Political Cooperation through their use. See Bull. EC, 6/1983, p.25.

[6] However, note that Article C(3) of the same title established that if action by the Community was necessary to achieve the objectives of the Union, for instance those referred in the rule quoted in the main text, the Council, on a proposal from the Commission, could decide unanimously to take "any appropriate measures." This provision was rather ambiguous. Did it provide for Community or Union competence? To make things clear, the possibility of adopting Community measures to support the objectives of the Union would be introduced in the EC Treaty, in a new Article 235A, by the "Draft Treaty on the Union" presented by the Luxembourg's presidency in 18 June 1991. According to that proposal the Council could even decide in what areas it would act by qualified majority. In any case, this new Article 235A does not substantially invalidate the assessment that the Community remained with no explicit competence on the matter. Under that provision, at most the Council could decide to adopt Community measures to support the Union objectives and only after request of the Council itself - acting within Article C(3) of the provisions of the title on "cooperation on home affairs and judicial cooperation". Note also that the latter document of the Luxembourg's presidency substantially repeated the rules of the previous document in almost all other respects of the matters here at stake. One exception was the previous reference in the mentioned Article A of the new Title to the European citizenship, which was deleted. See also Vignes, D., "Le Projet de la Présidence Luxembourgoise d'un 'Traité Sur L'Union' ", *RMCUE*, No.349, 1991, p.504.

Simultaneously, according to the Dutch draft, a new "Chapter X", on "Home and Judicial Affairs", would be added to the EC Treaty. In that chapter, a new Article 220a would establish that:

> "Without prejudice to the other provisions of this Treaty, and in accordance with the general objectives thereof, the Member States shall introduce cooperation in the following fields:
> (a) harmonisation of the formal and substantive aspects of the residence of third country nationals on the territory of the Member States;
> (b) harmonisation of the formal and substantive aspects of asylum policy;
> (c) combating unauthorised immigration and residence on the territory of the Member States by third country nationals;(...)".

Subsequent provisions of the same chapter provided for the adoption of legal "measures" on the matter, envisaging only eventual jurisdiction of the Court of Justice on them.

The following Dutch presidency proposal, presented on 8 November 1991, was the "Draft Union Treaty".[7] Its text developed the previous document and more closely resembles the final version of the Treaty on European Union.

A new Article 100C granted the Community explicit competence to deal with all aspects related to "the rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon" and "the general conditions governing authorised entry to and movement" within the EC by third country nationals - "including the determination of the travel requirements required for crossing the external borders of the Member States". The EC powers on the entry and movement of third country nationals for short stay included specifically the determination of "the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States" and the adoption of "measures relating to the introduction of a uniform visa."[8]

Cooperation between Member States "in judicial and home affairs" would not have any application to those aspects concerning visas. It would deal with asylum policy, conditions for third country nationals' entry and movement for long periods of residence, conditions of residence (including family reunion and access to employment), and the

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[7] See also Bull.EC, 9/1991, point 1.1.4., p.11.

[8] According to Article 100C of that proposal: "1. The Council, acting unanimously on a proposal of the Commission or on the initiative of any Member State, and after consulting the European Parliament, shall adopt the Directives relating to the approximation of the laws, regulations and administrative provisions of the Member States which concern the following areas, to the extent that such approximation is necessary to ensure the free movement of persons within the internal market: (a) the rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; (b) the general conditions governing authorised entry to and movement within the territory of the Member States as a whole by nationals of third countries for short stays, including the determination of the travel requirements required for crossing the external borders of the Member States. The Council shall, in a manner laid down in the previous paragraph, [unanimously] decide which of the decisions are to be taken by a qualified majority. 2.The Council, acting by a qualified majority, on a proposal from the Commission or on the initiative of any Member State, and after consulting the European Parliament, shall: - determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States; - adopt the measures relating to the introduction of a uniform visa."

combating of unauthorised immigration and residence.[9] The possibility of adopting joint positions, joint actions and proposals for Conventions on the fields subject to cooperation, was also envisaged.

Germany supported this Dutch proposal, but the United Kingdom successfully opposed it. The result was a compromise between the two diverging positions. In the final version of the Treaty, the Community was given competence only to define the uniform format for visas and to decide on the countries whose nationals would have to hold a visa to enter the Union. As Hendry states,

> "(...) the two aspects of visa policy concerned were regarded as sufficiently self-contained and severable from the generality of immigration policy to make this compromise workable."[10]

The fundamental issues related to third country nationals are not to be treated under the Community framework, but under the framework for Cooperation provided by Title VI of the Treaty on European Union. The setting up of this cooperation can be described as having been achieved through a grafting technique.[11] It is the result of the will of some governments of the Member States to keep such areas outside the Communities' framework.[12]

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[9] Article A of the "Provisions on cooperation in judicial and home affairs" provided that: "For the purposes of achieving the objectives of the Union, in particular the free movement of persons and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: 1.asylum policy; 2.immigration policy and policy regarding nationals of third countries: (a) conditions of entry and movement by nationals of third countries on the territory of Member States for long periods of residence; (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment; (c) combating unauthorised immigration, residence by third country nationals on the territory of the Member States;(...)". Compare with the final version of Article K.1, quoted in the beginning of part 1 of section B of this chapter.

[10] See Hendry, I.D., "The Third Pillar of Maastricht: Cooperation in the Fields of Justice and Home Affairs", *German Yearbook of International Law*, Vol.36, 1993, p.295, at 302.

[11] On the structure of the Union see, e.g., Curtin, Deirdre "The Constitutional Structure of the Union: A Europe of Bits and Pieces", *CMLRev*, Vol.30, 1993, No.1, p.17; Dewost,J.-L., "Les Problèmes Posés par la Structure du Traité: Quatre Points Particuliers", in *The Maastricht Treaty on European Union-Legal Complexity and Political Dynamic*, Monar, J. , Ungerer, W. & Wessels, W. (eds.), Brussels, European Interuniversity Press, 1993, pp.63-65; Everling, Ulrich "Reflections on the Structure of the European Union", *CMLRev*, Vol.29, 1992, No.6, pp.1053-1077; and Heukels, Ton & de Zwaan, Jaap , "The Configuration of the European Union", Community Dimensions of Institutional Interaction", in *Institutional Dynamics of European Integration - Essays in Honour of Henry Schermers*, Vol.II, Heukels, Ton & Curtin, Deirdre (eds.), Dordrecht, Martinus Nijhoff, 1994, pp.195-228. See also Maclay, Michael "The Community Beyond Maastricht - Multi-speed Europe?", London, Royal Institute of International Affairs, 1992; and Ungerer, Werner "Institutional Consequences of Broadening and Deepening the Community: The Consequences for the Decision-Making Process", *CMLRev*, Vol.30, 1993, No.1, p.70.

[12] The cooperation involved in Titles V and VI of the 1992 Treaty on European Union resembles De Gaulle's proposals of 1961 on a Political Union. They had the aim of "approximating, co-ordinating and unifying policies of the Member States in the spheres of foreign policy, the economy, culture and defense, under the general leadership of the Council of Heads of State or Governments". Decisions would be taken by unanimity. See Kapteyn, P.J.G. and Verloren van Themaat, P., *Introduction to the Law of the European Communities*, 2nd. ed., Deventer, Kluwer, 1989, p.21. The Treaty on European Union is a final confirmation of the alternative way followed by the Community in relation to economic issues. Meanwhile, the "caution" displayed in the Maastricht Treaty on common foreign and security policy may be more understandable. As far as Justice and Home Affairs are concerned, particularly in what regards

B) THE PROVISIONS OF TITLE VI, ON "COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS"

This section examines Title VI of the Treaty on European Union, which established a framework for "Cooperation in the Fields of Justice and Home Affairs", the so-called "third pillar" of the European Union. The analysis undertaken in this section endeavours also to put the legal examination of Title VI provisions in the context of the practical problems raised by the work already developed under this Title.[13]

1 - The Scope of the Activities

Article K of the Treaty on European Union establishes that cooperation in the fields of "justice and home affairs" is governed by the provisions of Title VI. *Justice and*

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immigration issues, see part 8 of section B, on the assessment of Title VI, in which an explanation is proposed for the fact that the EC governments prefer to treat immigration issues within an intergovernmental framework.

[13] There is by now an extensive bibliography on Title VI of the Treaty on European Union. Apart from works mentioned elsewhere, see, Gautier, Yves, "Titre VI, Article K à K.9", *Traité de Maastricht sur L'Union Européenne*, Constantinesco, V., Kovar, R. & Simon, D. (eds.), Paris, Economica, 1995; pp.813-859; and Monar, J. & Morgan, R. (eds.), *The Third Pillar of the European Union - cooperation in the fields of justice and home affairs*, European Interuniversity Press, Brussels, 1994. Some of the legal literature on the work and the structure of Title VI includes already the assessment of its functioning, particularly in view of the preparation of the 1996 Intergovernmental Conference. See, e.g, Hix, Simon, *The 1996 Intergovernmental Conference and the Future of the Third Pillar*, CCME Briefing Paper, No.20, Brussels, June 1995; Lepoivre, M., "Le domaine de la Justice et des Affaires intérieures dans la perspective de la conférence intergouvernementale", *CDE*, Vol.31, 1995, Nos.3-4, pp.323-349; Lodge, Juliet "Justice and Home Affairs - The internal security agenda", in *Crisis or Opportunity? Justice and Home Affairs*, Series on "The European Union and the 1996 IGC", Hull, Centre for European Union Studies, 1995; O'Keeffe, D. "Recasting the third pillar", *CMLRev*, Vol.32, 1995, No.4, pp.893-920, and "A Critical View of the Third Pillar", in *From Schengen to Maastricht*, Alexis, P. (ed.), Maastricht, EIPA, 1995; Standing Committee of Experts on international immigration, refugee and criminal law, *Proposals for the amendment of the Treaty on European Union at the IGC in 1996*, Utrecht, 1995. On the assessement of the operation of the Treaty on European Union see also the following reports of European institutions: the Bourlanges and Martin report of 4 May 1995, on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference - Implementation and Development of the Union, made on behalf of the Committee on Institutional Affairs Affairs of the European Parliament, doc.ref. A4-0102/95/Part I.A, on a motion for a resolution (particularly at p.7), and Part I.B, with the explanatory statements (particularly at p.5); the Commission Report on the Operation of the Treaty on European Union, Brussels, 10th May 1995, SEC(95) 731 final (particularly pp.56-62); the Council Report on the Functioning of the Treaty on European Union, Brussels, 1995 (particularly pp.35-38 and Annex XI(a)); the Court of Justice Report on Certain Aspects of the Application of the Treaty on European Union, Luxembourg, May 1995 (particularly pp.3, 11 and 12). See also the older Piquer report of 1 July 1993, on cooperation in the field of justice and internal affairs under the Treaty on European Union (Title VI and other provisions), made on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, doc.ref. A3-215/93. On the 1996 Intergovernmental Conference, in general terms, see, e.g.: Federal Trust for Education and Research, *Building the Union: reform of the institutions, The Intergovernmental Conference of the European Union 1996*, Federal Trust Paper No. 3, London, June 1995, and *State of the Union, The Intergovernmental Conference of the European Union 1996*, Federal Trust Paper No.1, London, February 1995; O'Keeffe, D., "From Maastricht to the 1996 Intergovernmental Conference: the Challenges Facing the Union", *LIEI*, 1994, No.2, pp.135-151.

Home Affairs is an umbrella expression covering a wide range of issues mentioned in Article K.1. This makes up an exclusive enumeration of the areas to be regarded by the Member States "as matters of common interest", for the purpose of "achieving the objectives of the Union,[14] in particular the free movement of persons".

The areas listed by Article K.1 are the following:

> "(1) asylum policy;
> (2) rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
> (3) immigration policy and policy regarding nationals of third countries;
> (a) conditions of entry and movement by nationals of third countries on the territory of Member States;
> (b) conditions of residence by nationals of third countries on the territory of the Member States, including family reunion and access to employment;
> (c) combating unauthorised immigration, residence and work by nationals of third countries on the territory of Member States;
> (4) combating drug addiction in so far as this is not covered by (7) to (9)
> (5) combating fraud on an international scale in so far as this is not covered by (7) to (9);
> (6) judicial cooperation in civil matters;
> (7) judicial cooperation in criminal matters;
> (8) customs cooperation;
> (9) police cooperation for the purpose of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol)."[15]

These areas include some fields specifically related to third country nationals - like asylum policy,[16] crossing of persons and controls at the external borders of the Union, immigration policy and policy regarding nationals of third countries. Moreover, it may be noted that virtually all areas mentioned by Article K.1 were already objects of the

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[14] The objectives of the Union refer also to the objectives and activities of the European Community. Among the latter are included: "an internal market characterised by the abolition, as between the Member States, of obstacles to the free movement of goods, persons, services and capital", and "measures concerning the entry and movement of persons in the internal market as provided for in Article 100 C". See Title I (Articles A and B) in the Treaty of European Union and the new articles 2 and 3 in the Treaty of Rome - on the EC objectives and activities, respectively. I will discuss infra the relations between the activities of the Community and those of Title VI of the Treaty of European Union.

[15] A declaration of the Conference on police cooperation confirms the agreement of the Member States on the objectives of the German delegation proposals, as presented at the European Council of Luxembourg of June 1991, and enumerates the priority areas for adoption of practical measures in this field.

[16] Under pressure from Germany, a Declaration of the Conference states that asylum issues would be considered a priority area, with the aim of adopting harmonisation action by the beginning of 1993. The Treaty did enter in force later than expected, but the Member States intensified their work on asylum and when the Treaty entered in force priority was given to harmonisation in the field of asylum and a considerable amount of work was developed. See, e.g., the Presidency Conclusions of the European Council Summit of Corfu (of 24 and 25 June 1994), in *Agence Europe*, No.6260, of 26 June 1994.

intergovernmental cooperation between governments of Member States, which was analysed in the preceding chapter.

One inevitable remark is that, in Title VI, activities on third country nationals are again put together with judicial and police matters, which are part of the repressive activities of the governments of the Member States. The protection and integration of third country nationals in the European society or in national societies are mentioned nowhere in the Treaty on European Union.[17] This, after all, follows the usual trend of the concerns of intergovernmental cooperation. The objective seems to be, if not repression (as in relation to illegal immigration), at least control of those persons. They appear as undesirable, as requiring control, and as demanding the same manner of combat as drugs, fraud and international crime. They are primarily a matter concerning police work.[18]

This assessment is only slightly mitigated by the argument that third country nationals are a political issue as sensitive as the other subjects of cooperation stated in Article K.1. But why not, then, envisage some measure at the European level, whatever that may be, to protect the rights of these persons? The planned judicial and police cooperation has not been sufficient to protect them,[19] nor could it be claimed that this kind of action could tackle all the social problems they face.[20]

There is also, of course, the sovereignty argument, according to which justice and home affairs are one of the distinctive features of independent states and cannot be given away. However this argument does not fit very easily with, for example, the creation of a European common currency, traditionally a distinctive feature of a sovereign country.

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[17] At least not explicitly, not even in one of the Declarations annexed to the Treaty.

[18] As Groenendijk puts it, there is "more attention for exclusion of new immigrants than for the position of settled immigrants", see Groenendijk, C.A. "Europese migratiepolitiek na Maastricht: uitbreiding en beperking van vrijheden" in *Migrantenrecht*, 1991, p.76, at 78. See also the curious remarks of Mancini, who wonders whether the fact that the Treaty on European Union deals with the migratory phenomenon in the optic of free movement of persons and not in terms of social policy and labour law, represents "social frigidity". He believes that is not the case, "at least south of London". Nevertheless, his former idea is a quite interesting one. See Mancini, G. F., "Il governo dei movimenti migratori in Europa", *Diritto del Lavoro e di Relazioni Industriali*, 1992, No.54, pp.233-242.

[19] Note, however, that Community and Union initiatives against racism were developed in the follow-up of the European Council of Corfu of June 1994. As early as May 1993, the Ministers of Justice and Home Affairs of the governments of the Member States said they have decided to "initiate a collection and analysis of information on expressions of racism and xenophobia in Member States with a view to identifying the possibilities of enhancing counteraction". See *Agence Europe*, No 5977 (10-11/5/93), p.8 and Bull.EC, 6/1993, point 1.4.19. Nevertheless the fact remains that no action in favour of third country nationals in the EC was envisaged in the Treaty on European Union. In any case, it may also be recalled that police departments may not always be the most trustworthy of people to protect third country nationals, if their behaviour in the last few years is taken into consideration. See, for France, Gresh, Alain "Ces Immigrés si coupables, si vulnérables - La démagogie contre le Droit", *Le Monde Diplomatique*, May 1993, p.3.

[20] Note that the Agreement on Social Policy has not been used yet to adopt binding measures on third country nationals, and its scope of action (as far as third country nationals are concerned) is limited to conditions of employment of legally resident workers. See infra, section C.

2 - Activities and Decision Making-Process

a) Activities

As far as cooperation on Home and Justice Affairs is concerned, there are several types of action envisaged by Article K.3 of the Treaty on European Union: (I) information and consultation for coordination on action, including collaboration between administration departments; (II) adoption of joint positions and promotion of cooperation; (III) adoption of joint action and (IV) the drawing up of Conventions.

Article K.3(1) states that in the areas of common interest:

> "Member States shall inform and consult one another within the Council with a view to coordinating their actions. To that end, they shall establish collaboration between the relevant departments of their administrations."

This cooperation includes both cooperation between representatives of the governments of the Member States and direct collaboration between equivalent national departments.

Besides that simple information and consultation for coordinated action, Article K.3(2)(a) also provides that the Council

> "adopt joint positions and promote, using the appropriate form and procedures, any cooperation contributing to the pursuit of the objectives of the Union".

Member States are then required to defend such common positions "within international organisations and at international conferences in which they take part".

A third level of activities is the adoption of joint action and of implementing measures for it. Relating to this there is the application of the subsidiarity principle, which was also introduced by the Treaty on European Union in the new Article 3B of the Treaty of Rome.[21] In fact, Article K.3(2)(b) states that joint action would be adopted

> "in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged".[22]

A fourth type of activity envisaged is the drafting of conventions, which the Council will recommend the Member States adopt, "in accordance with their respective constitutional requirements". There is no doubt as to the legal nature of the Conventions envisaged in Article K.3(2)(c). They are formal treaty instruments binding their Contracting Parties under international law.

Examples of the conventions suitable to be adopted in this way are the Dublin Convention, on applications for asylum in the Member States, and the draft Convention on controls at the external borders of the Community.[23] Other examples are the Europol

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[21] See supra section C of chapter 2, for an analysis of the relevance of the subsidiarity principle (as included in Article 3B of the EC Treaty) for the possibilities of Community action on third country nationals.

[22] This seems to be a reinforcement of the rule provided by the last paragraph of Article A of the Treaty on European Union.

[23] See the previous chapter for a more complete reference to both these two Conventions, drafted within the ad hoc intergovernmental cooperation framework, and the next chapter for an analysis on the draft convention on the Crossing of the External Frontiers of the Member States, presented by the Commission under Title VI.

Convention, already concluded,[24] and the Convention on the European Information System, still being negotiated.

Some authors,[25] quite sensibly, regret the absence in the Treaty of rules formalising the features that characterise conventions adopted under Article 220 of the EC Treaty.[26] In practice the drafting of conventions under this EC Treaty provision has a number of similar points to that of the Community acts.[27] The Commission is in this respect fully associated with the work of the Member States. The initiative of elaborating a convention is usually taken by common agreement of the Commission and the Council. The negotiations between the national representatives are attended by the Commission, which may even publish its opinion on the final drafts. Last, *but not least*, the European Court of Justice is usually assigned with competence for interpretation and ruling on any disputes regarding the application of the conventions.[28]

The rules of Title VI do not prohibit the adoption of Conventions with this kind of procedure. But it is far from obligatory, to say the least. The Commission may end up having had no decisive intervention in the elaboration of the conventions. According to Article K.3(2), it may present proposals to the Council,[29] but Member States may also present them. The Council is the sole institution entitled to take the initiative on certain subjects,[30] and in all cases is the one which adopts the final draft. Furthermore, the jurisdiction of the Court of Justice to interpret the Conventions and to rule on disputes regarding its application will exist only if it is explicitly established in each Convention.[31] This lack of obligatory competence of the Court of Justice on the Conventions adopted in

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[24] At least partially concluded, since the issue of judicial control has not yet been definitively settled, as mentioned in the previous chapter.

[25] Stangos, Petros N., "Les Ressortissants D'États Tiers au Sein de L'Ordre Juridique Communautaire", *CDE*, Vol.28, 1992, No.3-4, p.307, at 342.

[26] That provision states that "Member States shall, so far as is necessary, enter into negotiations with each other with the view to securing for the benefit of their nationals: - the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals (...); - the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."(Emphasis added). Two other areas are also referred to, but they are not very important for the purposes of this thesis. One is the abolition of double taxation. The other relates to companies and firms: their mutual recognition by Member States, the retention of legal personality in case of transfer of their seat from one country to another, as well as the possibility of mergers between them, when they are governed by the laws of different countries.

[27] Stangos, idem, p.342 and Isaac, Guy, *Droit Communautaire Général*, 2nd. ed., Place, Masson, 1989, at p.136.

[28] That was not the case in relation to the Rome Convention of 1967, on mutual assistance between customs administrations and on the "decisions of the representatives of the governments of the Member States meeting within the Council". However, strictly speaking, these decisions are not within the powers granted by Article 220 of the Treaty of Rome. See Isaac, op. cit., pp.136-8.

[29] Except in the fields referred to in Article K.1(7) to (9), as established by Article K.3(2). Note that the Commission does not have the formal power of presenting proposals in Article 220 of the EC Treaty.

[30] The ones referred in Article K.1(7)to(9), as mentioned supra.

[31] Third indent of Article K.3(2)(c). Hendry states that, "even if the European Court of Justice is not accorded [that] jurisdiction, the convention might still be enforceable by the International Court of Justice or another international tribunal, depending on the extent to which the jurisdiction of any such authority has been reciprocally accepted by Contracting Parties to the convention." See Hendry, op.cit., at p.313. The problem is that not all Member States have accepted the obligatory jurisdiction of the International Court of Justice. France, Germany, Greece, Ireland and Italy have not yet accepted such jurisdiction.

pursuance of Article K.2(c), as on the activities developed under Title VI in general terms,[32] simultaneously materialises and symbolises (here, again) the lack of progress in the Treaty on European Union.

Meanwhile, it is established that the recommendation and approval of Conventions will be done without prejudice to Article 220 of the EC Treaty.[33] The precise relationship between Article 220 of the EC Treaty and Article K.3(2)(c) of the Treaty on European Union, as well as the definition of their scope, are in no way solved by this reference. To try to clarify this relationship may prove to be almost as complicated as to clarify the relations between Title VI of the Treaty on European Union, in general, and Community Law - a problem that will be addressed below.[34] In this context, we should note that Article 220 of the EC Treaty only applies for the benefit of EC nationals.[35] On the contrary, issues concerning third country nationals only indirectly may benefit nationals of a Member State. That is particularly clear in the case of asylum.

Legal Nature of the Decisions

The precise legal character of the decisions of the Council is not always entirely clear. This may become a tricky question, in particular considering the fact that no obligatory judicial control is envisaged for the activities pursued under Title VI.[36]

The legal nature of the Conventions is clear. So too is the legal nature of the decisions envisaged by Article K.9, in which the Council decides to apply 100C of the EC Treaty to some of the activities dealt with under Title VI. This Council decision is a mere recommendation, with no binding effect in itself, since for such transferral to occur Member States have to agree with it according to their constitutional procedures.

However, the legal nature of the joint positions and joint actions does not seem so clear. Are joint positions acts mainly of a political character, and the joint action decisions of a legal nature? [37] Or is the legal character reserved to the implementing measures of joint action? The Treaty itself does not seem to help us much in coming to answers to these questions. A formal analysis of Article K.3 might suggest that the successive reference to "joint positions", and promotion of "cooperation" (to contribute to the Union objectives), "joint action" and even "conventions", would imply an "ascending order of formality" or of "anticipated substantive scope" between them.[38] Understood this way, "joint positions" would be the weaker instruments and "Conventions" undoubtedly the stronger.

Meanwhile, "joint actions" have been published in series L of the Official Journal of the European Communities. From a general perspective, it is interesting that Union

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[32] Infra, it will be noted that the jurisdiction of the Court of Justice exists as far as the EC Treaty provisions that apply to Title VI are concerned. See Article K.8 and, infra, the part on transparency and the sub-section 4, on the lack of an obligatory uniform judicial control on Title VI activities.

[33] Article K.3(2), second indent, (c).

[34] See infra.

[35] Or citizens of the Union.

[36] Except, as mentioned supra, in the case of Conventions stipulating such control.

[37] Jessurun D'Oliveira speaks of "joint positions" and "joint action" as "acrobatic stances". See Jessurun D'Oliveira, H.U., "Expanding External and Shrinking Internal Borders: Europe's Defense Mechanisms in the Areas of Free Movement, Immigration and Asylum" in *Legal Issues of the Maastricht Treaty*, O'Keeffe, David & Twomey, Patrick (eds.), London, Chancery, 1994, p.261, at 263.

[38] Hendry, op.cit, at p.310.

instruments are published in the Communities Official Journal. As far as the legal nature of the "joint actions" is concerned, their publication in series L, reserved for binding acts, seems to indicate that they are seen by the Council as also being binding. Moreover, it has been argued, correctly, that joint actions are binding inasmuch as they are part of the implementation of the Treaty on European Union.[39]

It seems that only clear positive rules on the matter will solve properly this problem. An alternative is the attribution to a single judicial authority of last recourse jurisdiction on instruments adopted under Title VI. Otherwise, the situation will remain uncertain. This is due also to the fact that courts in different Member States may have different interpretations of the matter, depending, for example, on whether their national legal system has a monist or dualistic vision of relations between international and national Law.

In any case, it must be noted that the overall majority of decisions adopted under Title VI have been decisions of a clearly non legally binding character, like recommendations, resolutions and conclusions.[40]

b) Decision Making Process

(i) Procedures and the position of the intervening institutions

Article D of the Treaty on European Union[41] provides that it is for the European Council to

> "provide the Union with the necessary impetus for its development and define the general political guidelines thereof."

Since this provision applies to the whole Treaty on European Union, the European Council has also a guiding and supervisory role in the activities of Title VI. However, it is for the Council of Ministers to take the current political decisions.

The Council is indeed the protagonist of the activities of Title VI, more than in any other field of Union activities.[42] Information and consultation to coordinate action is to be done within the Council. Adoption of common positions and promotion of cooperation is decided by the Council, acting unanimously. The same procedure applies for the adoption of joint actions and for the drawing up of conventions to be recommended for adoption by the Member States.

Unanimity will, likewise, be required for decisions on where to charge the operational expenditure arising from the implementation of the provisions of the Title -

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[39] O'Keeffe, "Recasting the third pillar", op.cit., p. 914.

[40] The Commission counted "some fifty" recommendations, resolutions and conclusions, adopted by the Council until May 1995, while only a few instruments envisaged in Title VI were approved, see the Commission Report on the Operation of the Treaty on European Union, p.56, point 119.

[41] Of Title I, on "Common Provisions", of the Treaty on European Union.

[42] On the role of the Council after the Treaty on European Union, see, e.g, Dashwood, Alan, "The Role of the Council of the European Union", in *Institutional Dynamics of European Integration - Essays in Honour of Henry Schermers*, Vol.II, Heukels, Ton & Curtin, Deirdre (eds.), Dordrecht, Martinus Nijhoff, 1994, pp.117-134.

either on the budget of the European Communities or on that of Member States.[43] On the other hand, a special qualified majority[44] will be sufficient for decisions of a procedural nature, or on measures to implement joint action, provided the Council decides so ... unanimously.[45] It is also provided that a majority of two thirds of the Member States[46] will be sufficient for the adoption of measures implementing the mentioned draft conventions - proposed by the Council pursuant to the second paragraph of Article K.3(2)(c). But a qualified majority will only be sufficient if those Conventions do not provide otherwise.

In any case, up to now, no substantive decision was taken under Title VI by qualified majority voting. Moreover, the requirement of unanimous vote in the Council has prevented the adoption of several acts, or downgraded these to non-binding instruments, like recommendations.

As far as the phase before the adoption of a decision is concerned, proposals for instruments to be adopted by the Council may be presented by the Commission or by any Member State. Exception is made for areas related with judicial cooperation in criminal matters, customs or police cooperation, on which only Member States may take initiatives. For the governments of the Member States the rule of the EC Treaty, according to which the Council may request the Commission to undertake studies and submit proposals, was not enough.[47] In the Community system the power to present proposals is, in any case, an exclusive privilege of the Commission.

The non-exclusivity of the Commission right to present proposals under Title VI is quite understandable considering the political sensitivity of the issues dealt with by it. What is surprising is the complete exclusion of the Commission from presenting proposals in certain fields. This seems particularly strange considering two facts. First, it contrasts with the unrestricted powers the Commission has to make proposals on Common Foreign and Security Policy, traditionally an area in which the Member States are particular sensitive to any interference of the Commission. Secondly, the Member States may, in any case, reject the proposals presented by the Commission, amend them, or present their own alternatives. The fact that, for this purpose, the mere institutional dialogue is seen as an

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[43] On this topic see the Working Document on the financing of the co-operation in the field of justice and home affairs, drafted by Patrick Cooney on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, of 13 April 1994, doc.ref. PE 209.039.

[44] By virtue of Article K.4 (3), for this purpose the votes of the Members of the Council are to be weighted according to Article 148(2) of the Treaty of Rome, but a qualified majority is only attained when there are eight countries in favour, as it is provided in the latter Article for decisions of the Council based on proposals which were not presented by the Commission. See also the reference of Article K.8 to several articles of the EC Treaty dealing with the internal organisation and work of the Parliament, Council and Commission.

[45] See, e.g., Article K.3(2)(b) in fine. Unanimity, however, is supposed not to be necessary for procedural matters referred to in Article K.4(3).

[46] Not of two thirds of the votes of the Member States, weighted according to Article 148 of the EC Treaty. Consequently the majority in principle required for approval of Implementing measures of the Conventions is less demanding than the qualified majority usually required in Title VI : 8 Member States plus 54 weighted votes, according to the second paragraph of Article K.4 (3).

[47] See its Article 152, applied in this Title by the remission of Article K.8.

undesirable factor appears to be quite significant.[48] It seems more the expression of a nostalgic feeling of pure intergovernmental cooperation, of the good old days when everything was simple and where the Commission was, at most, a guest.

Although the role of the Commission is undercut in the way mentioned, it is, nevertheless, supposed to "be fully associated with the work" carried out under the Title. This is a positive point, that should be neither overlooked, nor overestimated. This is due, inter alia, to the fact that the Commission has no executive power. The Commission is not responsible for the application of the measures adopted by the institutions, as it is in the European Communities,[49] nor is it the "guardian" of the Treaty on European Union, as it is of the EC Treaty.

Another relevant organ in the decision making process of Title VI is the Coordinating Committee.[50] This committee consists of senior officials who, besides coordinating the work carried out under the Title, will "give opinions for the attention of the Council, either at the Council's request or on its own initiative". It also has the functions of preparing the discussions on visa issues, as provided in the new Article 100C of the EC Treaty.[51] Hence, the committee assumes functions which are equivalent, in the activities of Title VI, to the committee of the Permanent representatives of the Member States.[52] But the Coordinating Committee reports to the COREPER, and does not substitute it within the work carried out under Title VI. Moreover, from a functional point of view, the advisory work of the Coordinating Committee corresponds also to the Economic and Social Committee. However, it represents no interest groups, a slight but important difference.

To a certain extent, the Coordinating Committee is equivalent to the Coordinators Group on the free movement of persons, which existed previously, in the framework of ad hoc intergovernmental cooperation. The Coordinating Committee concerns itself with the co-ordination of activities which were developed before the Treaty on European Union by a multitude of ad hoc groups and sub-groups.[53]

As far as the European Parliament is concerned, its intervention in the cooperation is quite limited. It is to be regularly informed by the Commission and the Presidency of the Council of "discussions in the areas covered by this Title".[54] However, there is no precise

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[48] See also O'Keeffe, "Recasting the third pillar", op.cit., p.905, who refers to a lack of "real inter-institutional dialogue".

[49] See, e.g., Article 155 of the Treaty establishing the European Community.

[50] Established by Article K.4.

[51] According to the new Article 100D.

[52] Established by the new first subparagraph of Article 151 of the Treaty of Rome, as amended by the Treaty on European Union. The original Article 151 had been repealed by Article 7 of the Merger Treaty. Article 4 of this Treaty had the same wording as the new first subparagraph of Article 151 of the Treaty of Rome.

[53] A full reference to the present working groups and sub-groups is made infra, in the sub-section which deals with the intermediate structure for decision-making and law enforcement of Title VI.

[54] Article K.6, paragraph 1.

elaboration on how regularly that information has to be provided.[55] It would reasonable to have a rule imposing the provision of information to the European Parliament, for example, each trimester.

The Parliament is also to be consulted by the Presidency "on the principal aspects of activities" in the areas covered by the Title. It is even stated that the Presidency "shall ensure that the views of the European Parliament are duly taken into consideration".[56] The Parliament has complained that it should be consulted before the adoption of instruments and that seems to be a justified request. It is difficult to see how the Parliament's views can be "duly taken in consideration" in the Title VI activities, if it is not properly informed of such activities, if it is not capable of forming an opinion on them, and if it cannot express its views before the adoption of instruments.[57]

It is also provided that the "European Parliament may ask questions to the Council or make recommendations to it". Furthermore, annually, "it shall hold a debate on the progress made in the implementation of the areas referred to in this Title."[58]

It is clear that under Title VI the European Parliament cannot be much more than a forum for discussion of the issues.[59] It will be informed and consulted (only on the principal aspects of the activities).[60] It may ask questions or make recommendations to the Council. However, it will not have to be consulted on singular decisions of the Council. Joint action, its implementing measures and proposals for Conventions may be adopted by the Council without previous consultation of the Parliament. There is only a general duty on the Presidency of the Council to take the views of the Parliament into consideration, whatever that means in strict legal terms.

This seems to display no major difference to the state of affairs previous to the entry into force of the Treaty on European Union. Already before, on its own initiative, the European Parliament was regularly discussing most of the issues referred to in Article K.1. It held debates, asked questions and made recommendations to the Commission and

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55 The third subparagraph of Article D of the Treaty on European Union, mentions only that "The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union."

56 Article K.6, second paragraph.

57 Note that in some reports of the Committee on Civil Liberties and Internal Affairs of the European Parliament on Council decisions adopted under Title VI, the rapporteurs refer to each of such decisions as a "draft", implicitly suggesting that the European Parliament does not recognise the procedure used in their final adoption. See the Lehne report, of 20 July 1995, on the "draft Council Resolution on the limitation on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self -employed persons", C4-7/95; the Roth report, of 20 July 1995, on the "draft Council Recommendation concerning a framework text of a readmission agreement between a Member State and a Third Country", A4-194/95; and the Caccavale report, of 20 July 1995, on "the draft Council Resolution on the admission of third-country nationals to the territory of the Member States of the European Union for study purposes", doc. ref. A4-181/95.

58 Article K.6, third paragraph.

59 See also the remarks of Niessen, Jan, according to whom "the Treaty on European Union gives no real boost to the European Parliament's influence, leaving it no more than 'Europe's most powerful NGO' ". Personal interview quoted in Ireland, P.R., "Asking for the Moon: the Political Participation of Immigrants in the European Community", *Revue Européenne des Migrations Internationales*, Vol.10, 1994, No.1, p.127.

60 Not also on the basic policy choices, contrary to what happens in the Common Foreign and Security Policy. See Article J.7, first subparagraph.

the Council. Due to its persistent efforts, it had also obtained official information from the Presidency of the Council on part of the work of the intergovernmental cooperation groups.[61]

The weak position of the Parliament under Title VI is one of its most negative points, being part of the democratic deficit of the European Union.[62] The fact that not even the minimum threshold of obligatory consultation is provided is particularly open to criticism. This minimum level does not give the Parliament a true say on Council decisions, nevertheless it is seen as undesirable by the Council and Member States.

This suggests that the main concern of the governments of Member States is not that the Parliament may block the adoption of measures drafted by the Council. Neither does obligatory consultation challenge national sovereignty, when the Council acts by unanimity. The resistance to the provision of full information of activities to the Parliament seems to point to another explanation of the Parliament's weak position within Title VI. It seems to indicate that the governments of the Member States see the European Parliament as a kind of powerful pressure group. If it is informed of draft measures, it may try to influence public opinion and make human rights groups, and other sectors of the public, aware of proposed instruments. By not providing information to the Parliament, the Council can adopt controversial measures smoothly. Public discussion is only possible on a *fait accompli*. This has implications for the issue of transparency, to be discussed below.

Another aspect related to the parliamentary accountability of the Title VI activities is the participation of national Parliaments in the decision-making process. The possibility that the Title VI structure of decision-making be changed so as to allow the participation of national Parliaments is opposed by those who would prefer the Community to act in the third pillar areas. However, as an intermediate solution, one could imagine some sort of procedure with the intervention of national Parliaments. After all, at the present moment, the national Parliaments do already intervene in the adoption of Conventions drawn under Title VI. Some changes in their intervention in this respect is also conceivable.

Currently, for Conventions drawn up by the Council to enter into force they have to be ratified by national Parliaments, according to their national procedures. Experience

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[61] See, e.g., the resolution of the European Parliament of 15 July 1993. There it restated the position that "the common immigration policy should respect the rules of parliamentary democracy and the role of the European Parliament in justice and home affairs should be strengthened" - *Agence Europe*, No.6024, 17/7/1993. Later, the institutional defects of Title VI were again pointed out by the European Parliament. On several occasions it has complained about its lack of participation in the decision-making process. For example, on 17 March 1994, prior to the meeting of the Justice and Home Affairs Council of 23 March in Brussels, the Committee on Civil Liberties and Internal Affairs of the European Parliament protested strongly against the decision of the Greek presidency to decline its invitation to inform the Parliament of the issues to be dealt with during the meeting, before the meeting was held. Furthermore, it expressed the wish to have a more significant role in the application and interpretation of a future External Borders Convention. The same type of complaint, of not having received information before the Council meetings, was repeated later, namely during the French presidency, in the second semester of 1995.

[62] I am not even referring here to the political participation of immigrants in the European Union. On this topic see Geddes, A., "Immigrant and Ethnic Minorities and the EU's 'Democratic Deficit' ", in *JCMS*, Vol.33, 1995, No.2, pp.197-217; and Ireland, "Asking for the Moon: the Political Participation of Immigrants in the European Community", op.cit., pp.127-142.

has shown that this is a very lengthy process. Instead, one could imagine that a specific type of Council instrument would enter into force provided that, within a period after its publication in the Official Journal (six or nine months for example), a majority of Parliaments of Member States did not express themselves against that instrument.[63] This would create a new type of procedure for adoption of Union binding acts, one whose structural dynamics would work more in favour of quick entry into force.

This new type of procedure should be an intermediate solution before a future passage to the Community of the activities presently developed under Title VI. The involvement of the national parliaments in the third pillar work may help to improve its transparency. However, from a structural and long term perspective, it does not seem to be an optimal solution. It does not seem to be very coherent to improve the position of national parliaments in the decision making process of the Union in this specific field, while not doing the same in other fields - like in those dealt with by the European Community, for example.

A final note must be made regarding the role of the Court of Justice of the European Communities in Title VI. According to Article L of the Treaty on European Union the jurisdiction of the Court of Justice is excluded in general terms from Title VI. The Court has only jurisdiction concerning EC Treaty provisions that apply to Title VI [64] and in the case where Conventions adopted under the Title explicitly provide for such jurisdiction. This lack of obligatory uniform judicial control on the activities of Title VI is dealt with below, in sub-section 4.

(ii) Transparency

One aspect in which Cooperation under Title VI is particularly open to criticism is the lack of transparency of its functioning. The lack of transparency of Community[65] and of Union functioning in general has already been criticised.[66] But it seems to be under

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63 The required majority of national Parliaments could also be equivalent to the majority of the population of Member States; or could be a qualified majority - using again the criterion of population or the current vote weighting system of the Council.

64 See Article K.8.

65 See, e.g., Clapham, who sustains that "there is a certain secrecy and obscurity about the decision-making process"of the Community. See Clapham, A., *European Union - The Human Rights Challenge*, Vol.I - *Human Rights and the European Community: A Critical Overview*, Baden-Baden, Nomos, 1991, at p. 61. The attempts to attain secrecy in the activities of the Union are noteworthy. See, e.g., the Commission proposal for a Council Regulation (EEC) on the security measures applicable to classified information produced or transmitted in connection with European Economic Community or Euratom activities, COM(92) 56 final and OJ C 72/15 of 21 March 1992. This proposal raised too much controversy to be approved. On this topic see *Official secrets law in the European Community?*, Statewatch Briefing Paper No.1, London, Statewatch, May 1992/March 1993; and the Duverger report on openness in the Community, made on behalf of the Committee on Institutional Affairs of the European Parliament, of 21 March 1994, A3-153/94.

66 On transparency in the European Union, in general, see Curtin, D. & Meijers, H. "The principle of open government in Schengen and the European Union: Democratic retrogression?", *CMLRev*, Vol.32, 1995, No.2., pp.391-442; Lodge, Joliet "Transparency and Democratic Legitimacy", *JCMS*, Vol.32, September 1994, No.3, pp.343-368; Piris, Jean-Claude "After Maastricht, are the Community Institutions

Title VI that it attains its lowest level. This is a quite important point because transparency is a fundamental right of the individual in a democratic society.[67] The transparency of governing bodies being crucial for a democratic society, the lack of transparency within the European Union is part of the democratic deficit of the latter.

In Title VI, one of the most important aspects of the lack of transparency is the fact that public discussions of draft Council decisions are virtually non-existent.[68] Generally speaking, the decisions of the Council are adopted without public debate on them. Proposals have been made that draft Council decisions, specially of a normative character, should be published in the Official Journal some time before being adopted by the Council.[69] It also seems appropriate that in the most important initiatives a process of consultation of human rights, immigrants and other interested organisations be launched.[70] Public discussion previous to the adoption of decisions in this field is surely a minimum requirement in a democratic system of government, and what was fought for and attained at the national level should not be lost at the level of the European Union.[71]

In this respect, an interesting aspect related to transparency is the public access to the Council working documents. This access has been the object of some cases in the Court of First Instance of the European Communities. One case has already been decided: Guardian v. Council.[72] In this case the then European affairs editor of the British newspaper sought access to some documents related to meetings of the Council of Ministers on Social Affairs, Agriculture, and Justice and Home Affairs. These documents included Coreper preparatory documents, the minutes, the attendance and voting records and the decisions of those meetings.

As far as the Justice and Home Affairs Council was concerned, the Guardian requested documents related to the Justice Council meeting of 29 and 30 November 1993. However, the Council refused access to minutes, the attendance and voting records and the decisions of that Council meeting. It stated that these documents

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More Efficacious, More Democratic and More Transparent ?", *ELR*, Vol.19, October 1994, No.5, pp.449-487.

67 O'Keeffe, "Recasting the third pillar", op.cit., p.917.

68 Exception may be made for some proposals of the Commission, like the External Frontiers Convention, which draft was published in the Official Journal of the European Communities. This draft Convention is analysed in the next chapter.

69 See, e.g., the proposals presented by the Standing Committee of Experts, *Proposals for the amendment of the Treaty on European Union* ..., op.cit., pp.3-4. This Committee proposes that a third paragraph be added to Article K.3, according to which drafts of joint positions, joint actions (or of measures in pursuance thereof), conventions (and measures implementing them) should be published in the Official Journal three months before the Council adopts a decision on them. Likewise adopted decisions would be published also after being adopted.

70 O'Keeffe, "Recasting the third pillar", op.cit., p.906-7.

71 See the general remarks of Jessurun D'Oliveira, quoted by O'Keeffe, "Recasting the third pillar", op.cit., p.917-8.

72 Case T-194/94, J.Carvel and Guardian Newspapers v. Council, judgment of the Court of First Instance of 19/10/1995, nyr. In another case pending now before the Court of First Instance, the applicant asked the annulment of a Council decision refusing access to certain documents concerning Europol, which had been requested under Council Decision 93/731/EC on public access to Council documents, quoted infra. See case T-174/95, Tidningen Journalisten v. Council, proceedings of the Court, No.26/95.

> "directly refer to the deliberations of the Council and cannot, under its Rules of Procedure, be disclosed".[73]

The Council stated that if allowed access to them, it would fail to protect the confidentiality of its proceedings, since the documents concerned contained "confidential information" on national governments positions during the Council deliberations.[74] The Council also refused access to the preparatory reports to the Justice Council meeting concerning its future working programme. It justified this refusal by the fact that these were preliminary texts preceding the decision of the Council (adopted in that meeting) to recommend the adoption by the European Council of December 1993 of the plan of action to be taken in the fields of Justice and Home Affairs.

The Guardian's request was dealt with within the procedures of the Council decision 93/731, on public access to Council documents, adopted on 20/12/1993.[75] This decision was based on the EC Treaty "and in particular Article 151(3) thereof",[76] as well as on the Council Rules of Procedure, "and in particular Article 22 thereof" - which, in turn, are based on that EC Treaty provision. However, according to Article K.8 of the Treaty on European Union, Article 151 of the EC Treaty is one of procedural rules of the EC Treaty that applies to the Cooperation Under Title VI of the Treaty on European Union.[77]

To decide the case, the Court of First Instance interpreted the provisions of the Council decision. Its most relevant provision for this case was Article 4(2), which provides that:

> "Access to a Council document may be refused in order to protect the confidentiality of the Council's proceedings".

The Court considered that:

> "It is clear from the terms of Article 4 of decision 93/731 and from the objective pursued by that decision, namely to allow the public wide access to Council documents, that the Council must, when exercising its discretion under Article 4(2), genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations."[78]

Considering the circumstances of the case, the Court ruled that the Council failed to exercise its discretion in compliance with this criterion.[79] The Council had not made a comparative analysis of on "one hand, the interests of the citizens seeking information and

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[73] Idem, paragraph 16.

[74] Ibidem, paragraph 22.

[75] Council decision 93/731 on public access to Council documents, adopted on 20/12/1993, OJ L 340/43 of 31/12/1993. This decision was published in the Official Journal together with a Code of Conduct Concerning Access to Council and Commission Documents, agreed by the Council and the Commission on 6 December 1993, doc.ref. 93/730/EC, OJ L 340/41-2 of 31/12/1993. Both the Code of conduct and the Council decision took effect from 1 January 1994. See also the Commission Decision of 8/2/1994 on public access to Commission documents, OJ L 46/58 of 1994. On Council decision 93/731, see also case C-58/94, Netherlands v. Council, which hearing took place on 10/10/1995, although the decision of the Court is still pending.

[76] Which provides simply that "the Council shall adopt its rules of procedure".

[77] As mentioned supra, the Guardian requests did also concern a Agriculture Council meeting.

[78] Case quoted supra, paragraph 65.

[79] Idem, paragraph 78

on the other hand of the Council interest in preserving the secrecy of its deliberations.[80] Therefore, the Court annulled the implied decision of the Council refusing the applicants access to the preparatory reports, the minutes, attendance and voting records of the Justice Council of 29 and 30 November 1993.[81]

It is quite interesting that the Court of First Instance (of the European Communities) ruled against the Council in this respect.[82] The case related to Council activities on part of which, in principle, the Court does not have jurisdiction.[83] It is clear that the Justice Council meeting of 29 and 30 November 1993 occurred under the rules of Title VI. There is no doubt that the Court's ruling is completely well-founded. As mentioned above, the Council decision 93/731, on public access to Council documents, is based on Article 151 of the EC Treaty. This applies to the activities of Title VI, by virtue of Article K.8.

Yet it does not seem to be very coherent that Community rules (including on judicial enforcement) apply to the activities of Title VI concerning public access to Council documents, but that similar rules do not apply to other closely related aspects - like on the European Parliament information of Title VI activities, and publication of draft Council decisions.

Transparency in this respect is a minimum requirement of a democratic system of government. Furthermore, in itself, it does not question in the least the national sovereignty of Member States.[84]

3 - Legal Limits of the activities developed under Title VI

a) Human Rights[85]

The Treaty on European Union provides explicitly for the respect of human rights. Article F establishes that:

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[80] Ibidem, paragraph 74.

[81] Note also that, before the ruling of the Court in case T-194/94, Guardian v. Council, which dates from 19 October 1995, the Council adopted a "Code of Conduct on public access to the minutes and statements in the minutes of the Council acting as a legislator". This concerns "items in the Council minutes relating to the final adoption of legislative acts within the meaning assigned to that term in the Annex to the Council' Rules of Procedure and the statements thereon". It was adopted by the Council at its general affairs meeting of 2 October 1995 (see the Press Release of the meeting, point 13).

[82] The Court annulled also the decision contained in the letter of the Council of 17 May 1994 refusing access to the minutes of the Agriculture Council of 24 and 25 January 1994.

[83] See again Article L of the Treaty on European Union and see also infra, sub-section 4, on the lack of an obligatory uniform judicial control on the activities of Title VI.

[84] In any case, note the draft Council decision on publication in the Official Journal of the European Communities of acts and other texts adopted by the Council in the field of asylum and immigration, Brussels, 16/11/1995, COREPER, 11699/95, ASIM 313. This document was not yet approved.

[85] See Gaja, G., "The protection of Human Rights under the Maastricht Treaty", in *Institutional Dynamics of European Integration - Essays in Honour of Henry Schermers*, Vol.II, Heukels, Ton & Curtin, Deirdre (eds.), Dordrecht, Martinus Nijhoff, 1994, pp.549-560; and Twomey, P., "Title VI of the Union Treaty: 'Matters of Common Interest' as a Question of Human Rights", in *The Third Pillar of the European Union...*, op.cit., pp.49-66.

"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (...) and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

This corresponds, basically, to the case-law of the Court of Justice on Community Law. The mention of such a rule here constitutes a positive extension to the European Union of EC Law principles. However, it should be kept in mind that the Court of Justice has no jurisdiction on the Common Provisions of the Treaty on European Union. This justifies the view that that provision is mainly a political declaration.[86]

Meanwhile, Article K.2(1) provides that activities under Title VI will be carried out in compliance not only with the European Convention of Human Rights but also with the Geneva Convention on the Status of Refugees, "and having regard to the protection afforded by Member States to persons persecuted on political grounds".[87] One may question the legal relevance of this Article, giving the absence of any power of the Court of Justice to control the activities under this Title. I would even dare to say that, to a certain extent, this kind of mere formal assurance that human rights will be observed, sounds more like a notice that they may be disregarded, than a guarantee that they will be respected.[88]

Nevertheless, there is always the possibility that this provision be invoked in a national court. It may also be invoked in the European Court if competence is attributed to the Court by a Convention elaborated in pursuance of Article K.3(2)(c), as mentioned above.

b) Article K.2 (2), on Member States' responsibilities "on law and order and the safeguarding of internal security"

Article K.2(2) provides that:

"This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

Here we have the reverse problem of the former rule. The point is not that it may be difficult for individuals to invoke the rule against governments. The danger lies in its

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[86] See "A legal Analysis of the Treaty on European Union" in *The new Treaty on European Union*, Vol.2: *Legal and Political Analysis*, Brussels, Belmont European Policy Centre, 1992; p.37 at 44.

[87] One could wonder why it is that only political grounds are mentioned, for the Geneva Convention refers to other motives not less worthy of attention. The reason is probably related to the debate in Germany on the right of asylum. Article 16(2) of the Basic Law (*Grundsgesetz*) of 1949 of the Federal Republic of Germany provides that: "Persons persecuted on political grounds shall enjoy the right of asylum". See also its Article 19. In any case, it does not seem very coherent to distinguish here between protection against persecution on political grounds and on other relevant grounds.

[88] Such formal declarations, considering their political objectives and practical consequences, constitute for certain purposes a kind of "license to kill", in James Bond style. If his mission was to protect the lives (and interests) of the *free world*, he should not hesitate in killing if necessary for that aim. It is not absurd to fear also that here the protection of human rights may cede to considerations concerned with repression and safety. However, see Hendry, who believes that, although it is "difficult to see what legal purpose Article K.2 serves(...) it provides political reassurance, in legally binding terms". In any case, as he rightly points out, it may also help Member States refuse certain proposals. See Hendry, op.cit., at 307-8.

eventual use by governments against individuals. Or its use in order to claim limits on the Member States' commitments under this Title.

In this respect, Hendry argues that this Article "provides a clear basis for resisting proposed action under Title VI", when a Member State considers that such action "might prejudice the exercise of its responsibilities to maintain law and order or to safeguard internal security." He adds that:

> "(...) Member States may feel obliged to have recourse to Article K.2 to derogate from measures adopted in pursuance of Title VI; and in case of doubt they can be expected to make provision in such measures to enable them to do so."[89]

From a strict legal perspective it may be too forceful to consider this Article as a kind of derogatory or safeguard clause. This provision may be seen as another political declaration with the aim of relaxing the worries of the national governments on threats to their basic autonomy. However, "the maintenance of law and order" is such a vague expression that it may support almost any governmental excuse to keep or adopt national rules and practices.

In any case, the precise legal importance of this provision depends also on an available judicial system for its interpretation. This relates to the next point.

4 - The *Judicial Deficit* - The Lack of an Obligatory Uniform Judicial Control on Title VI Activities and Instruments

As mentioned before, the jurisdiction of the EC's Court of Justice on activities of Title VI is limited to EC Treaty provisions that apply to Title VI [90] and to the possibility that Conventions adopted under the Title by the Council (acting by unanimity) do explicitly provide for such jurisdiction.[91]

The role of the Court of Justice within the system of the European Communities, the European Union and in European integration in general terms, has been analysed thoroughly.[92] As far as Title VI is concerned, it is important to emphasise that the lack of

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[89] Idem.

[90] These relate to procedural rules of EC institutions functioning. See Article K.8.

[91] Article K.3(2)(c), last paragraph.

[92] On the Court of Justice, in general terms, see, e.g., Arnull, Anthony, "Judging the new Europe", *ELRev.*, Vol.19, Feb.1994, No.1, p.3; Barav, A., "Omnipotent Courts", in *Institutional Dynamics of European Integration...*,op.cit., pp.265-302; Bebr, G., "Court of Justice: Judicial Protection and the Rule of Law", in *Institutional Dynamics of European Integration...*, op.cit., pp.303-331; Burley, A.-M. & Mattli, W., "Europe Before the Court: A Political Theory of Legal Integration", *International Organization*, Vol.47, 1993, pp.41-76; Cappelletti, M., "Is the European Court of Justice 'Running Wild'?", *ELR*, Vol.12, 1987, No.1, pp.3-17; Dehousse, R., *La Cour de Justice des Communautés européennes*, Paris, Montchrestien, 1994; Kapteyn,P.J.G. "The Court of Justice of the European Communities after the Year 2000", in *Institutional Dynamics of European Integration...*, op.cit., pp.135-152; Rasmussen, H., "On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking", Dordrecht, Martinus Nijhoff, 1986; Rasmussen, H. "Between Self-Restraint and Activism: A Judicial Policy for the European Court", *ELR*, Vol.13, 1988, No.1, pp.28-38; Shapiro, M.,

a obligatory uniform judicial control, on the activities and legal instruments adopted under the framework of Title VI, means that one of the most negative aspects of the activities of the old ad hoc intergovernmental cooperation has not been overcome.

As O'Keeffe points out, the failure to have judicial review in the areas covered by Title VI,

> "would leave the Union open to the charge that in areas governed by the Third pillar it does not provide for an adequate system of legal remedies, that it is not a system governed by the rule of law, and that individual rights are not adequately protected."[93]

It is very important that the European Union be able to provide a uniform interpretation and application of instruments adopted under Title VI. In particular as far as free movement is concerned, it is of the utmost importance that the law in practice be the same everywhere in the Union. The very right of equality before the law may be at stake. Uniform jurisdiction on Title VI could also help to overcome some legal uncertainties deriving from Title VI rules, like those concerning the precise legal value of instruments adopted under that Title, the standards for human rights protection, the definition of general clauses like those of Article K.2(2),[94] not to mention general concepts and expressions used in instruments adopted under the Title.[95]

It does not seem advisable to rely on the already existing power of judicial review of protection of human rights of the Strasbourg Court of Human Rights. This power would be insufficient to achieve an effective uniform interpretation and application of Union rules. First, the jurisdiction of this Court is limited to the European Convention of Human Rights and Fundamental Freedoms. If recourse was to be made to the Strasbourg Court concerning a Union measure, this Court could only say whether or not it violated that Convention. It could not rule on the interpretation as such of Union rules. Secondly, despite recent changes in the structure of enforcement of the E.C.H.R., the functioning of the Court of Strasbourg is much slower than that of the EC Court of Justice. This is an important point in an area in which fundamental human rights are likely to be at stake. It may also be noted that, according to the E.C.H.R., a case can only be submitted to the Commission and Court of Human Rights at Strasbourg after exhaustion of national remedies. Thirdly, the fact that in the Strasbourg Court of Human Rights sit judges

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"The European Court of Justice ", in *Euro - politics : Institutions and Policymaking in the New European Community*, Alberta Sbragia(ed.), Washington, D.C., Brookings Institution, 1992; Weiler, J. 'The Court of Justice on Trial', *CMLRev*, Vol.24, 1987, pp.555-89; Weiler, J.H.H., "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration", in *JCMS*, Vol.31, December 1993, No.4, pp.417-446. See also the Rothley report on the role of the Court of Justice in the development of the European Community's constitutional system, of 6 July 1993, on behalf of the Committee on Institutional Affairs of the European Parliament, doc.ref. A3-0228/93; the Editorial Comments of the Common Market Law Review : "Quis custodiet the European Court of Justice?", *CMLRev*, Vol. 30, No.5, 1993, pp.989-903, and "The IGC 1996 and the Court of Justice", *CMLRev*, Vol.32, No.4, 1995, p.883-892.

93 O'Keeffe, "Recasting the third pillar", op.cit., p. 910.

94 On Member States' responsibilities "on law and order and the safeguarding of internal security".

95 See those used in the draft External Frontiers Convention, examined in the next chapter.

representing countries which are members of the Council of Europe, but not of the European Union, is also a problem.

It seems clear that the EC Court of Justice[96] is the best judicial organ to have jurisdiction on activities and instruments adopted in the framework of Title VI. Several arguments can be adduced in favour of granting to it such jurisdiction.[97]

The first point to be made is that the EC Court of Justice is the natural organ to which jurisdiction on Union activities, to the extent that it is necessary, should be granted. To the extent that binding rules (procedural rules and normative acts) are at stake at the Union level, it should be for the Court of Justice to rule on their interpretation and on disputes arising from them. In principle, no other Court is better positioned to do so than the EC Court of Justice itself.

Moreover, its jurisdiction would assure a consistent interpretation of Community Law and instruments adopted under Title VI,[98] the close relationship between which will be highlighted below. The coherence of the Union actions and policies would, undoubtedly, be better achieved if all matters related to Union activities (in all the three "pillars") be scrutinised in the last resort by one single Court.

Furthermore, the Court has also experience in fields close to those of Title VI, like free movement of persons, and institutional conflicts. This experience could be a valuable asset in the interpretation of instruments adopted under Title VI, and in ruling on disputes arising from the implementation of these instruments or from the very functioning of Title VI.

It also appears likely that to grant the Court of Justice jurisdiction over Title VI would mean that a minimum threshold of human rights protection would be guaranteed. One of the reasons that makes some legal authors advocate the attribution of jurisdiction to the EC Court of Justice is the hope that the latter would apply to the matters at stake the positive aspects of its jurisprudence on Community Law. As O'Keeffe states,

> "(...) it might be expected that the Court could emphasise the rule of law, the pre-eminence of the general principles of law such as equality and non-discrimination, legal certainty, legitimate expectation, ne bis in idem, the right to a fair hearing, proportionality and the respect of the principles contained in human rights instruments to which the Community or its Member States are parties, including the European Convention on Human Rights."[99]

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[96] I refer here also to the Court of First Instance of the European Communities.

[97] See the arguments of Groenendijk,C.A in favour of the jurisdiction of the European Court of Justice on the Schengen and Dublin agreements, in "The Competence of the EC Court of Justice with respect to inter-governmental Treaties on Immigration and Asylum", *International Journal of Refugee Law*, Vol.4, 1992, No.4, p.531; and in "The Competence of the EC Court of Justice", published in *A new immigration law for Europe?*, by Boeles, P. et al., Utrecht, Dutch Centre for Immigrants, 1993, pp.31-39. See also the part of section A of the next chapter, on the proposed jurisdiction of the Court of Justice on the Convention on External Frontiers.

[98] Not surprisingly this aspect is highlighted in p.3 of the Court of Justice Report on the Application of the Treaty on European Union, quoted supra.

[99] O'Keeffe, D., "The New Draft External Frontiers Convention and the Draft Visa Regulation", *The Third Pillar of the European Union...*, op.cit., pp.135-149, at pp.144-145.

However, the governments of Member States have resisted granting to the EC Court of Justice jurisdiction on the activities developed under Title VI and on the instruments adopted under that Title. Even the use of the possibility provided by Article K.3(2)(c), of granting jurisdiction in relation to Conventions adopted under the Title has proved to be unacceptable to some member States. A recent notorious case is that of the Europol Convention.[100] As mentioned in the previous chapter, this Convention was signed in July 1995, although the issue of judicial control on the Europol activities has not yet been definitively settled. The United Kingdom persists in refusing the obligatory jurisdiction of the Court of Justice on disputes between Member States on the interpretation and application of the Convention. Article 40 of the Convention regulates this matter. It provides for an initial stage of discussions within the Council with a view to finding a settlement.[101] After a period of six months it is provided that the member States in dispute "shall decide "the modalities according to which they shall be settled".[102] All Member States, except the United Kingdom, have declared that, in that event, they will "systematically submit the dispute in question to the Court of Justice of the European Communities".[103] However, it seems that the national parliaments of some Member States, particularly those of the Benelux, are not willing to ratify the Convention without the guarantee that the EC's Court of Justice will have jurisdiction on it, including as far as the United Kingdom is concerned.[104]

What can explain that Member States governments resist so much having activities under Title VI, including its instruments, under the control of the EC Court of Justice? The main problem in this respect seems to be that some Member States' governments want as much as possible to have a free hand in the fields of "Justice and Home Affairs". Some times, any judicial control of immigration measures is seen as undesirable, even at national level.[105] Moreover, to a certain extent, the concern of some Member States' governments seems also to be related to the Court of Justice itself. Given the case-law of the Court on respect for human rights,[106] recalled above by O'Keeffe, they would not feel safe against Court judgments if they entrusted it with a controlling task. Things could get out of hand. In this sense the lack of jurisdiction of the Court of Justice on activities and instruments adopted under Title VI appears also as a kind of punishment of the Court.[107] A punishment for being too good at its job: for being independent and for protecting human rights.

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[100] Convention of 26 July 1995 based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316/2, of 27/11/1995.

[101] Idem, Article 40(1).

[102] Article 40(2).

[103] This type of solution was previously suggested by the Standing Committee of Experts, *Proposals for the amendment of the Treaty on European Union* ..., op.cit., pp.3-4.

[104] See *MNS*, July 1995 and *Statewatch*, Vol.5, November - December 1995, No.6, p.5.

[105] See, e.g., the controversy between the then French Home Affairs minister Charles Pasqua and the national courts about judicial decisions controlling the legality of expulsion orders and of other migration related measures, see Legouy, André "Quand le violeur crie au viol", *Plein Droit*, No.24, 1994, p. 19.

[106] In spite of all its limitations and some incoherence. See, e.g., my analysis of cases Demirel and Bozkurt, in chapter 5.

[107] On this topic see Arnull, "Judging the new Europe", op.cit., at 13.

Yet, that lack of jurisdiction will be to the detriment of the uniformity of the "law in practice". Furthermore, it is those who are deprived of such an important instrument of defence of fundamental human rights who will ultimately be the losers.[108]

5 - The Intermediate Structure of Decision Making and Law Enforcement[109]

The intermediate structure of decision-making and law enforcement of the "third pillar" of the Union is the following. Below the Council there is the Coreper, to which reports the K.4 Committee, on the fields of activities of Title VI of the Treaty on European Union. The latter Committee is supposed to ensure overall coordination of the several working groups acting in this area. These working groups are put together under three Steering Groups, or Committee Directories. The first Steering group regards **Asylum and Immigration**, and may be considered the successor of the Ad Hoc group on Immigration. It includes sub-working groups on migration (admission and expulsion), asylum, visas, external frontiers controls and false documents. In the area of immigration and asylum there are also CIREA (Centre for Information, Research and exchange on Asylum) and CIREFI (Centre for Information, Research and Exchange on the crossing of Borders and Immigration). Both are under the first steering group. The second steering group relates to **Police Cooperation**, in security and customs matters. It deals with matters previously treated by Trevi working groups and by the old CELAD and MAG. Its sub-groups deal with terrorism,[110] police cooperation (operational and technical), drugs, serious organised crime, and police cooperation on customs. A sub-group on EURODAC

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108 As Toulemon recalls: "(...) porquoi ne pas insérer dans le nouveau traité les mesures minimales nécessaires pour tout à la fois garantir les droits de l'homme et assurer une répression efficace du crime organisé [?] (...) Dans une union politique digne de ce nom, il appartiendrait au législateur commun (...) d'établir à la fois les garanties des libertés et la loi penale commune applicable évidemment aux seuls crimes et délits présentant un caractère international par les conditions de leur préparation ou de leur exécution." See Toulemon, Robert "Communauté Européenne, Union Politique, Conféderation - diplomatie ou démocratie plurinationale?" in *RMCUE*, 1992, p.428 at 430. See also the Rothley report on the role of the Court of Justice in the development of the European Community's constitutional system, made on behalf of the Committee on Institutional Affairs of the European Parliament, of 6 July 1993, doc.ref. A3-228/93.

109 See, inter alia, the Commission Report on the Operation of the Treaty on European Union, op.cit., point 124; Den Boer, M. "Police Cooperation in the TEU: Tiger or Trojan Horse?", *CMLRev*, Vol.32, 1995, No.2, pp.555-578, at 558; O'Keeffe, "Recasting the third pillar", op.cit., p.903; the *Programme de Travail prioritaire pour 1994 et structures à instaurer dans le domaine "Justice et Affaires intérieures"*, Conseil de l'Union Européenne, Note de la Présidence, Bruxelles, 2/12/1993, doc. ref. 10684/93 Restreint JAI 12; and " 'Third pillar' meetings", *Statewatch*, Vol.5, 1995, No. 4.

110 However, operational cooperation on terrorism seems to be dealt with outside the framework of Title VI of the Treaty on European Union. Apparently, the operational part of the old Trevi structures is still functioning. As noted in the previous chapter, according to Article 2(2), second paragraph, of the Europol Convention concluded in July 1995, cooperation against terrorism will be part of Europol activities no later than two years after the beginning of its functioning. See the Europol Convention concluded on 26 July 1995, OJ C 316/2, of 27/11/1995. This beginning of Europol operations requires the ratification of the Europol Convention, which at the present moment does not seem to be capable of being completed in the near future. In any case note that Europol is not meant to have operational tasks, but mainly the task of collecting and analysing information. See Article 3 of the Europol Convention.

("European automated fingerprint system"), which is a planned computerised fingerprint identification system for refugees and asylum-seekers, is also working under the second Steering Group. Finally, this Steering group includes also the Ad Hoc Group on Europol. The third Steering Group works on **Judicial Cooperation** both in Criminal and in Civil Law matters. It works in domains previously dealt with under European Political Cooperation. As far as **Criminal Law** is concerned, within the third Steering Group there are sub-groups on extradition, criminal law (including relations between criminal law and Community Law), and on the withdrawal of driving licenses. In relation to **Civil Law**, there is one sub-group for examining the possibilities of extending the scope of application of the Brussels Convention to Family and Succession Law, another for undertaking the elaboration of a document to simplify and accelerate procedures of transmission of acts between Member States, and another on commercial law (and protection of financial interests and control of fraud).

Reporting directly to the K.4 Committee there are the National Drug Coordinators (the old CELAD), the Horizontal Information Group (working, for example on the European Information System), and the Consultative Commission on Racism and Xenophobia. However, it is a negative factor that this Commission does not have contacts with the work of the various groups and sub-groups which are supposed to implement the strategy to fight against racism, taken on the basis of the Commission's work.

Finally, there is also the Europol Drugs Unit, presently working on the basis of a Council joint action,[111] until the entry into force of the Europol Convention.[112]

There is widespread agreement that the functional structure of Title VI needs improvement. As the Council itself has recognised, the structure above described is "very cumbersome" and has slowed down the decision making process.[113] The multi-tier structure does not facilitate the search for compromise and "makes it too easy to refer matters to the next level above".[114]

This aspect seems to be paradigmatic of the Cooperation developed under Title VI on the whole. While it constitutes some progress in relation to the old ad hoc intergovernmental cooperation, it keeps some of the structural defects of the latter.

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[111] Joint action of 10 March 1995 adopted by the Council on the basis of Article K.3 of the Treaty of European union concerning the Europol Drugs Unit, OJ L 62/1-3 of 20/3/95. See the previous chapter for historical details of the EDU.

[112] As mentioned in the previous chapter, the Europol Convention (OJ C 316/2, of 27/11/1995) was signed on 26 July 1995, although the issue of judicial control on the Europol activities has not yet been definitively settled. The United Kingdom persists in refusing the obligatory jurisdiction of the Court of Justice on the Europol Convention.

[113] Council Report on the Functioning of the Treaty on European Union, p.38.

[114] See the Commission Report on the Operation of the Treaty on European Union, op.cit., point 124. The Commission adds that at some levels of the structure some people are not familiar with "Community negotiating methods".

6 - Relations between Title VI and the European Community[115]

a) general aspects

It is quite challenging to ascertain what are the legal frontiers between Community Law and the law provided by and adopted under Title VI of the Treaty on European Union.[116] A crucial point in this respect is to determine whether there are areas of Community competence which are also subject to cooperation under the third pillar. The coincidence, or virtual overlap between objectives, competences and instruments of the European Communities and those of Title VI may be seen in several areas.

As far as drugs are concerned, for example, Article K.1(4) and (7) to (9) deals with "combating drug addiction", "judicial cooperation in criminal matters", "customs cooperation", and "police cooperation for the purposes of preventing and combating (...) unlawful drug trafficking". Meanwhile, Article 129 of the EC Treaty states that

> "Community action shall be directed towards the prevention of diseases, in particular the major health scourges, including drug dependence, by promoting research into their causes and their transmission, as well as health information and education".

This can raise problems, for example because the Commission does not have the right of initiative in areas covered by Article K.1(7) to (9).[117]

As far as the fight against fraud is concerned, it is also mentioned as an area of common interest in Article K.1(5) and (7) to (9). Simultaneously, Article 209a of the EC Treaty obliges Member States to take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.[118]

Moreover, customs cooperation is envisaged in Article K.1(8), while it is essential for the operation of the Community common commercial policy.[119]

The processing of personal data is regulated by instruments adopted by the Community[120] and by instruments concluded or being negotiated under Title VI - like the

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115 See Bieber, R. "Links Between the 'Third Pillar' (Title VI) and the European Community (Title II) of the Treaty on European Union", in *The Third Pillar of the European Union...*, op.cit., pp.37-47; Demaret, Paul, "Le Traité de Maastricht ou les Voies Diverses de L'Union", idem, pp.37-48, at 41; Heukels & de Zwaan, "The Configuration of the European Union", op.cit., at pp.225-228; Müller-Graff, P.C., "The legal Basis of the Third Pillar and its Position in the Framework of the Union Treaty", *CMLRev*, Vol.31, 1994, No.3, pp.493-510 (published also in *The Third Pillar of the European Union...*, op.cit., pp.21-36, see pp.31-2); and O'Keeffe, "Recasting the third pillar", op.cit., pp. 911-3.

116 The relation between Title VI and Community Law has some similarities to the relation between the EC Treaty as such and the Social Policy Agreement. The relation between these is analysed infra, in section C, part 2.

117 O'Keeffe, "Recasting the third pillar", op.cit., p.913.

118 As far as fraud is concerned see also Weiler, J.H.H., "Neither Unity nor Three Pillars - The Trinity Structure of the European Union", in *The Maastricht Treaty on European Union*, op.cit., pp.49-62, at 56 and 60.

119 See idem, at p.56.

120 See, e.g., the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31 of 23/11/1995.

Europol Convention,[121] the European Information System Convention, and the draft Convention on crossing the external frontiers of the Member States.[122] As O'Keeffe states, the potential for their overlap is clear, without going so far as to claim incompatibility.[123]

In any case, the coincidence, or virtual overlap between EC objectives and competences and those of the third pillar may also be found in areas more concerned with this thesis.

The status of third country nationals, for example, is one of the most important topics to be treated under Title VI.[124] It is already covered in some aspects by Community Law, as explained in Part I of this thesis.[125] Likewise, the control of the external frontiers of the Member States and the issue of visas, included in Article K.1(2), are indeed part of a global policy to establish an internal market, as defined by Article 7A.[126] Visas are to be dealt with partly within the third pillar and partly within the Community framework under Article 100C. In the next section it will be seen that the line between the two frameworks is not always easy to draw. This difficulty seems to apply to the whole area of free movement of persons. According to Article K.1 of the Treaty on European Union, the cooperation on Justice and Home Affairs is to be undertaken:

> "For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community(...)."[127]

It could be concluded that, as far as free movement of persons is concerned, the objectives of the Community and of the European Union are identical.[128]

Furthermore, arguably the Community had and still has the means to attain the Union objectives concerning free movement of persons. I am referring here, for example, to Articles 100 and 235 of the EC Treaty, which were analysed in chapter 2.[129] Article 100 gives the Community powers to adopt Directives to approximate national rules that "directly affect the establishment or functioning of the common market". Article 235 allows the Council to take appropriate measures "to attain, in the course of the operation

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121 Quoted supra, Articles 7 to 9 and 13 to 25.

122 The two latter Conventions are still being negotiated and the draft external border Convention is analysed in the next chapter.

123 O'Keeffe, "Recasting the third pillar", op.cit., p.912. Indeed sometimes these instruments include provisions designed to avoid conflicts and overlaps, but only their practical application will show to what extent these provisions are capable of solving all problems. See, e.g., Article 3(2), first indent, of the EC Directive on protection of individuals with regard to the processing of personal data ..., quoted supra.

124 Article K.1(3).

125 See also Article 2(3) of the Social Policy Agreement, analysed infra, in section C.

126 O'Keeffe, "Recasting the third pillar", op.cit., p.912.

127 See also Article M and to a certain extent even Article B, as far as the respect for the *acquis communautaire* is concerned. See also Article 134 of the Convention Applying the Schengen Agreement, already referred to in chapter 6. It has a similar rule: "The provisions of this Convention shall apply only in so far as they are compatible with Community Law".

128 See also the Commission report on the operation of the Treaty on European Union, point 126.

129 See in this respect also Heukels & de Zwaan, who state that "Article 100, 100A and 235 of the EC Treaty with their potential for extended Community action remain in substance unaffected by the Maastricht Treaty", Heukels & de Zwaan, op.cit., p.225.

of the common market, one of the objectives of the Community", in case that the EC Treaty has not provided the necessary powers to adopt those measures. Among the Community objectives there is the free movement of persons. This is particularly obvious after the Single European Act, as an area without internal frontiers had to be created.[130] Therefore, as far as free movement of persons is concerned, it could be argued that the Community has competence equivalent to that provided in Title VI.

To the extent that the objectives and competence of the Community and of the third pillar are similar, all Title VI does, in legal terms, is to provide a formal alternative for the decision making process of the Community.

According to this idea, after the entry into force of the Treaty on European Union, Member States are legally allowed to go "procedure shopping" in dealing with an area referred to in Article K.1, which is also important for the establishment of the internal single market, or with any other Community objective on which EC measures may be adopted under Articles 100 or 235 of the EC Treaty.[131]

An exception to this assessment may derive from the fact that Article 7A of the EC Treaty establishes a duty on the Community to establish an internal market.[132] If the concept of an internal market is strictly defined, the duty and thus the space for Community action is reduced. In that case, the areas capable of being treated only by the third pillar expand. However, if the concept of internal market is interpreted in a broad, or, more accurately, in a substantive manner, then the duty and space for Community action enlarges. With it enlarges also the possibility to choose one of two alternative frameworks for decision-making: either the Community or the third pillar framework.

A final note must be made on the possibility of concrete conflict between instruments adopted within the Community and instruments adopted under Title VI. It is submitted that, in this case, Community instruments should prevail.[133] Arguably, this derives from the reference in Article K.1 to the fact that the cooperation under Title VI is to be pursued "without prejudice to the powers of the European Community". This is not a straightforward provision like Article 134 of the Schengen Implementing Agreement,

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130 See, in this respect, e.g., the European Parliament's resolution of 7 April 1992 on the results of the intergovernmental conferences, *Agence Europe documents* No.1769 of 10/4/1992.

131 The Commission, apparently, has a different view, see COM (95) 346, p.11 of the introduction.

132 See also Müller-Graff who wonders: "whether there is any obligation of the Commission or of the Council to proceed on the basis of Community powers, or whether they can choose to abstain from using them and alternatively to use the procedure of the third pillar." He believes that: "[i]n principle, the existence of a Community power should not necessarily exclude the procedure of international cooperation, specially if results could be achieved this way rather than by efforts to issue a Community act. However, in Community law there are limits to the extent to which institutions may abstain from the use of Community powers, one limit being the scope of Article 175 EC (...)". See Müller-Graff, *CMLRev*, op.cit., at p.505. The limits set by Article 175 may be related to the duty to establish an internal market defined in Article 7A, as suggested in chapter 3.

133 This should apply also to agreements and international engagements undertaken by the Community. As Heukels & de Zwaan recall, it "cannot be completely excluded that actions envisaged within the framework of [Title VI] may interfere with the Community's exclusive external competence pursuant to the AETR doctrine". See Heukels & de Zwaan, op.cit., p.226. Pointing in the same direction see also Weiler, "Neither Unity nor Three Pillars - The Trinity Structure of the European Union", op.cit., at 56.

according to which the provisions of that Agreement "shall apply only insofar as they are compatible with Community law". However, it may be argued that, in strict legal terms, the creation of a framework for cooperation under Title VI does not diminish Community competences. The reference in Article A that the Union is founded on the European Communities, and "supplemented by the policies and forms of cooperation established by this Treaty", may be interpreted as further confirming the Community prevalence.[134]

b) the passerelle provision of Article K.9 [135]

Article K.9 is one of the so called "passerelles" to the Community procedures. It envisages the possibility of applying the new Article 100C of the Treaty of Rome to actions in the areas of Title VI - with the exception of judicial cooperation in criminal matters and customs and police cooperation. Article 100C, analysed below in section C, gives the Community competence to rule on some aspects of visa policy.

To use the procedures of Article 100C in the areas of Title VI, it is necessary to amend the Treaty on European Union. This amendment is made here according to Article K.9, by way of derogation from Article N of the Treaty on European Union. Both the Commission and the Member States may present proposals with that aim. The Council will decide on them, acting unanimously. It will, "at the same time", also determine the voting conditions for decisions on the new Community areas. In the end, it will recommend that Member States adopt such decision according to their respective constitutional requirements. No specific intervention of the European Parliament is envisaged in the procedure of this Article. This contrasts with Article N, which requires that the Parliament be consulted before the calling of an intergovernmental conference to revise the Treaty.

Article K.9, as other "passerelle" provisions,[136] seem to be a good example of material political declarations existing in legal instruments. They are mainly expressions of will for progress and a memory note for future decisions. In fact, Article K.9 establishes no duty to act on the Member States or Union institutions. Obviously, it does not give Member States any power they did not have before.

The only legal effects Article K.9 has are to derogate from the general rule of Article N(2) to amend the Union Treaties, creating thus a fast track amendment procedure. It will not be necessary to consult the Parliament and call an intergovernmental conference. The Council may directly make a proposal to the Member States. Apart from these aspects, Article K.9 constitutes a mere political declaration, being the result of a compromise between two opposite positions.[137]

Some Member States (Belgium, Netherlands and Germany) would prefer to make straight-away an express inclusion in the Community framework of issues related to the right of asylum, as well as control of the external borders. Belgium supported its view on

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[134] See also Article C of the Treaty on European Union, providing that: "The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*."

[135] For a detailed analysis of this provision see Bieber, R., "Links Between the 'Third Pillar' (Title VI) and the European Community (Title II) of the Treaty on European Union", op.cit, at pp.40-44.

[136] There is, for instance, the twin provision of Article 100C(6).

[137] See Doutriaux, Yves, *Le Traité sur L'Union Européenne*, Paris, Armand Colin Éditeur, 1992, at p.228.

the eventual declaration by the Court of Justice that the establishment of a single internal market, with no internal frontiers, necessarily implicates a common policy on issues related to the free movement of persons. Others, such as the United Kingdom and Denmark, would prefer to leave the intergovernmental cooperation as it was - operating in an informal manner, outside the framework of official European institutions. In the end, Denmark only accepted the "passerelle" provision on the condition that it would require the specific national approval necessary for the ratification of any international treaty.[138]

In any case, up to now, the possibility provided by Article K.9 has not yet been used.[139]

7 - Article K.7 - Relations with other types of intergovernmental cooperation developed outside the Treaty on European Union

Article K.7 of Title VI provides that:

> "The provisions of this Title shall not prevent the establishment or development of closer cooperation between two or more Member States in so far as such cooperation does not conflict, or impede, that provided for in this Title."[140]

This provision seems to apply to the cooperation between the United Kingdom and Ireland resulting from their common travel area, as well as the Benelux arrangements in this field - already preserved by the EC Treaty.[141]

However, the main objective of this provision seems to be to protect and legitimise the cooperation currently existing in the Schengen group. As mentioned in the previous chapter, this could be a laboratory for future solutions for all Member States, an intermediate step towards measures applying in the Union as a whole.

Carlier raises the possibility that a blocking minority be formed inside the Council, formed, for example, by the Member States who signed the Schengen Agreements.[142]

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[138] That means in Denmark either a majority of 5/6 members of the Folketing or both a majority of the members of the Folketing and a majority of voters in a referendum. See on this topic the note of Gjørtler, Peter, "Ratifying the Treaty on European Union: an interim report." *ELR*, Vol.18, August 1993, No.4, p.356.

[139] A Declaration of the Intergovernamental Conference that approved the Treaty on European Union, states that asylum issues would be considered a priority area, with the aim of adopting harmonisation action by the beginning of 1993. By the end of 1993 the Council would also consider, on the basis of a report, the possibility of applying Article K.9 to matters related with asylum policies. However, the Commission, in its Report to the Council on the possibilities of applying Article K.9 of the Treaty on European Union to asylum policy, SEC (93) 1687 final, of 4/11/1993, concluded that it was not yet appropriate to make recourse to the possibility envisaged by Article K.9 as far as the field of asylum was concerned.

[140] A similar provision can be found in Article 100C(7), according to which: "The provisions of Conventions in force between the Member States governing areas covered by this Article shall remain in force until their content has been replaced by directives or measures adopted pursuant to this Article."

[141] See Article 233 of the EC Treaty, allowing for more close regional integration between the Benelux countries.

These Member States could try to use their power to impose certain views or even to prevent the adoption of Union-wide measures, prepared under the framework of Title VI. In this case, that author sustains that the Schengen Implementing Agreement would be contrary to Article 5 of the EC Treaty of Rome. I fail to see how to apply that provision in the context of Title VI,[143] particularly without questioning the relationship of the latter Title with the EC Treaty in general terms, and in particular as far as the Community objectives (including those of Article 7A) are concerned.

However, the rule embodied in Article K.7 seems to be interesting for another reason. It seems to entail the danger of violating the principle of non-discrimination on grounds of nationality, to the extent that closer cooperation between some Member States may end up giving more rights to nationals of some Member States than to nationals of other Member States.

This may have a concrete relation to Community Law, as the Matteucci case[144] seems to suggest. This case concerned an Italian woman living and working in Belgium. Under Article 7(2) of Regulation 1612/68 she is entitled, as a worker in the territory of another Member State, to the same social advantages as national workers.[145] This includes the right to a grant awarded for maintenance and training with a view to the pursuit of studies in the field of further vocational training.

The applicant, Mrs. Matteucci, had applied for such a grant to the Belgian government. The problem was that the grant which she had applied for was awarded only within the framework of a bilateral agreement between Belgium and Germany. Under this Agreement, each Contracting Party undertook to grant scholarships to nationals of the other party for the purposes of studying, researching, or to complete training in the other country.[146]

Nevertheless the Court of Justice ruled that the Belgian government was under an obligation to require the German government to grant a scholarship to Mrs. Matteucci. As far as the German government is concerned, the Court ruled that:

> "Since Article 7 of Regulation No 1612/68 requires the host Member State to grant the same social advantages to Community workers as to its own nationals, another Member State may not prevent the host Member State from fulfilling the obligations imposed on it by Community Law."[147]

It explained that:

> "Article 5 of the [EC] Treaty provides that the Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of the

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142 Carlier, J.Y., "L'Europe et les ressortissants des États tiers: de la coopération intergouvernementale vers le droit communautaire", *Actualités du Droit (Revue de la Faculté de Droit de Liége)*, No.2, 1993, p.207, at 209.

143 Compare Article 5 of the EC Treaty with the simple reference made in Article A of the Treaty on European Union to the fact that the Union tasks "shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples."

144 Case 235/87, Matteucci v. Communauté française of Belgium and commissariat général aux relations internationales of the Communauté française of Belgium [1988] ECR 5589.

145 See supra, chapter 4, section B.

146 See paragraph 3 of the decision of the Court in the case.

147 Idem, paragraph 18.

> obligations arising out of the Treaty. If, therefore, the application of a provision of Community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate the application of the provision and, to that end, to assist every other Member State which is under an obligation under Community law."[148]

This seems to suggest the existence of a general rule in Community Law, which, it is important to emphasise, applies only when a Member State is obliged to treat nationals of other Member States as its own nationals.[149] Apparently, that Member State cannot invoke an agreement with one or more Member States (applicable only to their nationals) to exclude nationals of the remaining Member States from the benefits of that agreement. According to the words of the Court in the Matteucci case, this rule would be valid "even where the agreement [as such] falls outside the field of application of the Treaty".

As far as Schengen is concerned, in principle this Community rule on non-discrimination should not raise problems, since, for example, Article 1 of the Schengen Implementing Agreement defines an alien as being "any person other than a national of a Member State of the European Communities". However, the existence of such Community rule on non-discrimination remains of relevance in a more general manner. It applies to any agreement between some Member States granting rights to nationals of some Member States, while excluding nationals of other Member States from the enjoyment of such rights.

The application of this Community rule on non-discrimination on grounds of nationality may be excluded by Community Law itself, as in the case of the Benelux. However, otherwise, the question may be raised whether "closer cooperation between two or more Member States", although cleared under Article K.7 of Title VI, may eventually violate that Community rule on non-discrimination, in the sense explained.

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[148] Ibidem, paragraph 19.

[149] This may include not only resident workers who are nationals fron another Member State, benefiting from equality in social advantages under Article 7(2) of Regulation 1612/68, as previously mentioned; but also mere tourists, according to the rule of the Court of Justice in case 186/87, Cowan v. Trésor Public [1989] ECR 195.

8 - General Assessment of Title VI

The cooperation provided by Title VI is a middle way solution between the Community institutional framework and that of the old ad hoc intergovernmental cooperation, although closer to the latter.[150] Some of the most negative points of the previous ad hoc intergovernmental cooperation have not been overcome.

It is of the utmost importance to emphasise that under Title VI there is no balance of powers between the different institutions. The Council is the indisputable protagonist of the activities developed under this Title. In practice, it can act without paying much attention to the Commission or the European Parliament.[151] The Commission does not the exclusive right of initiative and in certain areas cannot even present proposals to the Council. The European Parliament does not even have the right to be consulted on the individual decisions to be adopted by the Council. The lack of accountability to the European Parliament most of the time has not been, and some times cannot be, properly compensated for by the control exercised by national parliaments over their governments.

Moreover, the activities developed under this Title suffer from a serious and unjustified lack of transparency. One striking example is the fact that the draft Council decisions are rarely published, or subject to any public discussion before being adopted. The lack of transparency, at this minimum level, is one of the most negative aspects of the activities developed under Title VI. As Touraine recalls, secrecy is the antithesis of democracy.[152]

Another major weakness of Title VI is the lack of an obligatory and uniform judicial control on its activities and on instruments adopted under it. This control should be made by the Court of Justice of the European Communities. As argued above, this control is necessary to guarantee uniform interpretation of legal instruments across the Member States, coherence with Community Law and respect for human rights.

Other aspects of Title VI which need to be revised are the unclearness of the legal status of Council decisions, the five-tier structure of decision making in the Council, and the potential for overlap or conflict with Community activities and instruments.

The effectiveness of the cooperation developed under Title VI must also be mentioned. Progress has been achieved in some fields. The activities under this Title seem

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150 On this topic see, e.g, Melchior, according to whom "(...) le Traité clarifie le schéma institutionnel en 'prêtant' à la nouvelle forme de coopération intergouvernementelle les institutions communautaires. Ces dernières utilisent cependant des procédures tout à fait distinctes des procédures communautaires classiques." See Melchior, F. "Le Traité de Maastricht sur L'Union Européenne (essai de présentation synthétique)", *Actualités du Droit*, 1992, No.4, p.1207, at 1252. Müller-Graff states that "(...) this cooperation: in its core is intergovernmental cooperation, but is a developed form of intergovernmental cooperation" - Müller-Graff, *CMLRev*, op.cit., at p.497. See also Hartley, T. C. "Constitutional and Institutional Aspects of the Maastricht Agreement", *ICLQ*, Vol.42, April 1993, No.2, p.213, at 229; and Pocar, Fausto & Secchi, Carlo, *Il Trattato di Maastricht sull' Unione Europea*, Milan, Giuffrè Editore, 1992, at p.15.

151 In fact, this will be the "pillar" of the Union in which the Council has the most power. Several analogies can be found between the procedures of Title VI and the procedures envisaged in Title V, on Cooperation on Common Foreign and Security Policy. However, in the latter, the powers of the Commission to present proposals to the Council are not limited as in Title VI - see Article J.8 (3) and (4).

152 Touraine, A.," Democracy ", *Thesis Eleven*, No.38, 1994, pp.1-15, at 3.

to have accelerated with the approach of the 1996 Intergovernmental Conference. Apparently, Member State governments want to show that Cooperation in Justice and Home Affairs is not a failure. However, the requirement of unanimous vote in the Council has prevented the adoption of several important instruments, like the External Frontiers Convention. In other cases, the need to achieve unanimity in the Council downgraded draft documents to non-binding instruments, like recommendations or resolutions. Non-binding instruments account, in fact, for the majority of Council decisions. Finally, important instruments already adopted by the Council, like the Europol Convention, have not yet entered in force and it is impossible to know when they will.[153]

Another important point relates to the relations between the framework for Cooperation under Title VI and the Community framework. As suggested above, to the extent that the Community objectives are similar to those of Title VI, all the latter does, in legal terms, is to provide a formal alternative for the Community decision making process. This seems particularly clear in what regards free movement of persons and the establishment of the internal market.

Therefore, one may wonder why an alternative framework was necessary. The official answer to this question is that the fields covered by Title VI are closely concerned with national sovereignty and thus cannot be treated within the Community framework.[154] Instead, an intergovernmental framework like that provided by Title VI could deal with such issues.

This reasoning seems to be based on a clear contraposition between the Community framework and that of intergovernmental cooperation. However, it has been stressed that cooperation under Title VI is not pure intergovernmental cooperation.[155] Moreover, it has been pointed out that "the institutional aspects of the Third Pillar cannot be described adequately in terms of the distinction between intergovernmental and supranational" frameworks.[156]

Following these ideas I suggest analysing Title VI keeping in mind that its different institutional aspects are not necessarily entailed by each other. The point I want to make is

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[153] Note that the Council itself recognised that "the initial results of the application of [Title VI] are inedequate although it is emphasized that the matters covered by this Title (...) are very sensitive and time has been very short to allow a true assessment." See the Council Report on the Functioning of the Treaty on European Union, Brussels, 1995, pp.35, point 75.

[154] The same reason was already given as far as the ad hoc intergovernmental cooperation is concerned.

[155] O'Keeffe, "Recasting the third pillar", op.cit., p.901.

[156] Snyder, Francis, "Institutional Development in the European Union: Some Implications of the Third Pillar", in *The Third Pillar of the European Union...*, op.cit., pp.85-95, at 90. My subsequent reflections, in the main text, have their origin in my reading of this article. Note that Snyder advances "the hypothesis that the distinction between intergovernmentalism and supranationalism is losing its relevance in the context of the European Union". Idem, loc.cit. On institutional problems of the third pillar see also: de Zwaan, Jaap W., "Institutional Problems and Free Movement of Persons - the legal and political framework for cooperation", in *Free Movement of Persons in Europe: Legal Problems and Experiences*, T.M.C. Asser Institute Colloquium on European Law, Session XXI, 1991, Schermers, H.G. et al. (eds.), Dordrecht, Martinus Nijhoof, 1993, pp.335-351; Groenendijk, C.A, "Three Questions About Free Movement of Persons and Democracy in Europe", in *Free Movement of Persons in Europe...*, op.cit., pp.391-402; and Monar, Joerg, "The Evolving Role of the Union Institutions in the Framework of the Third Pillar", in *The Third Pillar of the European Union...*, op.cit., pp.69-83.

that not all institutional features of Title VI are exclusively explained by the official position that national sovereignty has to be preserved. In my opinion its institutional features are also explained by the emphasis on a restrictive immigration policy. It is well-known that, to a lesser or greater extent, in the last two decades, an emphasis on restrictive immigration policies has prevailed in Member States. The emphasis on such policies may explain various positions and solutions adopted by Member States that cannot be understood simply in terms of a mere concern to retain national sovereignty. This seems to be clearly the case with reference to the serious lack of transparency, and even the lack of adequate parliamentary and judicial control in relation to Title VI. It is true that an eventual need to obtain the assent of the European Parliament to adopt measures, or the control by the EC Court of Justice of common measures adopted unanimously, could set limits on Member States' powers. But more important than Member States' fears of being limited, as such, seems to be their desire to operate as freely as possible in immigration matters. This desire may manifest itself at a national[157] or European level. Anything that may put in danger the effectiveness of a restrictive immigration policy is avoided.

If the European Parliament had any concrete power it could be more difficult for the Council to adopt restrictive measures on immigration. The European Parliament has usually been more "progressive" than most of the national parliaments. Likewise, review by the Court of Justice of restrictive immigration policies in terms of respect for fundamental rights could undermine the effectiveness of the former. Furthermore, the lack of provision of simple information to, or consultation of, the European Parliament, seems to be explained by the wish to maintain secrecy in the activities developed under Title VI. The lack of transparency in more general terms contributes to preventing public discussion of restrictive measures, and thus to avoiding pressure being brought against them by immigrant associations and human rights groups. The will to assure the full effectiveness of a restrictive immigration policy prevails over the concern for respect of fundamental human rights and for democracy within the European institutions.

By way of conclusion, it is submitted that the institutional features of Title VI are partly explained by the wish of Member States to work in secrecy as far as immigration matters are concerned, and to be free to adopt and implement restrictive immigration policies. To the extent that this is so, the institutional framework of Title VI is not explained by the wish to retain national sovereignty as such. It is explained by the wish to retain the possibility of making a specific use of that sovereignty. This use is open to challenge, even by those that may be concerned with the preservation of national sovereignty in the current process of European integration.

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[157] Note, for example, the controversy between the then French Home Affairs minister Charles Pasqua and the French courts about judicial decisions controlling the legality of expulsion orders and of other migration related measures. On this topic see Legouy, André "Quand le violeur crie au viol", *Plein Droit*, No.24, 1994, p. 19.

C) AMENDMENTS TO THE TREATY OF ROME

1 - The new Article 100C of the EC Treaty, on visas

a) general aspects

The only aspects concerning third country nationals, on which the Community was granted explicit competence by the Treaty on European Union, were aspects related to visas. The Community was recognised as having competence, first, to determine the third countries whose nationals must have a visa to cross the external borders of the Community and, secondly, to define a uniform format of visas.

According to Article 100C(1), the elaboration of the list of countries whose nationals will be required a visa to enter the Community [hereinafter the "list of visa countries"] is to be decided unanimously by the Council until 1 January 1996, and by a qualified majority after that date. However, when faced with the danger of a "sudden inflow" of nationals of a third country into the Community, the Council may introduce a visa requirement for such persons, deciding by qualified majority. This visa requirement may only be introduced, in this manner, for a period of six months. The need for an easier decision making process, when confronted with an emergency, was decisive in putting aside the rule of unanimity. However, if it proves necessary to extend the period in which a visa is required, the visa requirement will have to be adopted by unanimity, again.

Meanwhile, Article 100C(3) provided that measures related to the uniform format for visas were to be decided by the Council before 1 January 1996, also acting by qualified majority.

In the areas of application of Article 100C, the Council will decide on a proposal from the Commission,[158] the usual Community procedure. However, the Commission is supposed to "examine any request made by a Member State that it submit a proposal to the Council".[159] This is more than what was already provided for in Article 152, according to which such requests may only be done by the Council, as an organ.[160] The Council will also have to consult the European Parliament before adopting a decision under this Article. That is the same requirement made in Articles 100 and 235 of the EC Treaty.[161]

Moreover, it may be noted that Article 100C(5) repeats the rule of Article K.2(2), mentioned above, on the safeguarding of Member States exercise of responsibilities in relation to "internal security". Furthermore, Article 100C(6) is a symmetrical rule to the

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[158] Note that the Council will also act on a proposal of the Commission in a situation of emergency, when there is "a threat of a sudden inflow of nationals" from a third country. In that event, the Commission will present a "recommendation". It is interesting that the Council, in such a delicate field, will be dependent on the Commission to act in a situation of "emergency". This contrasts with the fact that in the fields mentioned in Article K.1(7) to (9) the Commission cannot even make proposals to the Council.

[159] Article 100C(4).

[160] Article 152 is applicable to Title VI by virtue of Article K.8 of this Title.

[161] See infra, on the amendment made by the Treaty on European Union to the procedure of Article 100 of the EC Treaty.

passerelle provision of Article K.9, analysed above.[162] Meanwhile, Article 100C(7)[163] is a partial replica of Article K.7, on the possibility for closer cooperation between Member States. Article 100C(7) has only one small difference compared to Article K.7. It refers expressly to "Conventions in force between the Member States".

It seems obvious that the explicit competence of the Community is not very much enlarged with the granting of powers on visas. Visas are only one aspect of immigration policies. The coordination of these policies will be pursued in the framework of the cooperation established in Title VI of the Treaty on European Union. To decide what countries' nationals will be required to obtain a visa in order to enter the Community is an important but quite limited aspect of the whole problem. It does not seem that Article 100C constitutes much more than psychological progress. The Intergovernmental Conferences probably adopted it just to make the symbolic point that it was enlarging Community competence in this field. Clearly, it was not meant to make a major difference.

The next chapter will analyse the rules on visas proposed by the Commission draft External Frontiers Convention and of the Commission draft Regulation on the list of visa countries. The examination of the latter will concentrate specifically in the proposed list of visa countries and the criteria used to compile it. In this chapter, the following subpart of this section discusses the precise extent of the material scope of Community competence on visas under Article 100C of the EC Treaty, with reference to the Commission draft Regulation on the list of visa countries.

b) the material scope of Community competence on visas under Article 100C

The precise material scope of the Community competence under Article 100C may be discussed by reference to the Commission proposal for a Regulation establishing a list of visa countries.[164] This draft Regulation, analysed in the next chapter, was presented under Article 100C of the EC Treaty. As far as the list of visa countries is concerned, the relevant parts of this Article are its first paragraph and part of the third, which state that:

> "1. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States."

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[162] In any case, in 1996, the Intergovernmental Conference planned in Article N(2) of the Treaty of Maastricht may also enlarge the competencies of the Community on third country nationals.

[163] As mentioned supra it provides that: "The provisions of the Conventions in force between the Member States governing areas covered by this Article shall remain in force until their content has been replaced by Directives or measures adopted pursuant to this Article".

[164] See the Commission's "Proposal for a Regulation determining the third countries whose nationals must be in possession of a visa when crossing the external frontiers of the Member States", presented together with the draft Convention on the crossing of the external borders, COM (93) 684 final, of 10/12/1993, p.39. This draft Regulation was already adopted as Council Regulation (EC) No.2317/95 of 25/9/1995, OJ L 234/1 of 3/10/1995. Both the draft Regulation and the draft Convention are analysed in the next chapter. It may also be noted that, following a Commission draft presented under Article 100C in July 1994 - COM(94) 287 final, of 13/7/1994 - the Council adopted Regulation (EC) No.1683/95 of 29/5/1995, laying down a uniform format for visas, OJ L 164/1 of 14/7/1995.

"3. From 1 January 1996, the Council shall adopt the decisions referred in paragraph 1 by qualified majority."

The discussion about the draft Regulation on the list of visa countries showed two diverging perspectives as to the proper interpretation of these paragraphs of Article 100C. The divergence concentrates on two aspects of the draft Regulation. One is the elaboration and the precise binding force of the list of countries set out in the draft Regulation. The other is its provision for mutual recognition of visas between Member States.

According to a broad interpretation, adopted by the Commission, Article 100C would authorise, e.g., the adoption by the Community of a negative and a positive list of countries whose nationals have, and do not have, respectively, the need to hold a visa when crossing the external frontiers of the Member States.[165] Furthermore, Article 100C would also grant the Community competence to establish mutual recognition between Member States of visas issued by other Member States, which are valid throughout the Community. The Commission sustains a broad interpretation with the following reasoning. The place of Article 100C in the EC Treaty "shows that this article forms integral part of the provisions relating to the internal market".[166] Moreover, "Article 100C confers an exclusive power on the Community".[167] The very language of Article 100C(1) "makes it plain that the Community is under an obligation to take the action referred to in paragraph 1" and "that any action on the part of the Member States is precluded as from the entry into force of the Treaty on European Union."[168] In a more extreme position, the European Parliament believes that Article 100C "actually provides for harmonisation of visa policy".[169] Thus, it proposes that the draft Regulation provides on conditions for the

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165 Instead of referring to a positive and a negative list, it could be said that the list of countries referred to in Article 100C is exclusive or not. If the list of countries is exclusive that means that the Member States cannot require a visa from a national of a country not included in it. Therefore the positive list (the list of countries whose nationals can enter a Member State without a visa) is defined by contrast, by contraposition. The Community has powers to enact positive and negative lists. On the other hand, if the list is not exclusive, then the Member States may require visas from nationals of other countries not included in the list adopted. In this case, the Community would not have power to make the so-called positive list, but would only have the power to establish a "negative" list of visa countries. To speak about an exclusive or non exclusive list has the advantage of placing the issue more directly in the context of the discussion on competence. However, the terms "negative" and "positive list" are widely used. Thus they will also be used in this chapter so as not to add further complications to a matter that is already quite complicated.

166 First considerandum of the Preamble of the draft Regulation. See also the Explanatory Memorandum of the Commission on the draft Regulation, p.1 - COM (93) 684 final. Curiously, according to the European Parliament, an identical reference to the internal market (in the third recital of the Preamble of the draft Regulation) should be deleted.

167 Explanatory Memorandum of the Commission on the draft Regulation, p.3.

168 Idem, p.2.

169 See p. 16 of the explanatory statement included in the Froment-Meurice's Report of 29 March 1994 on the Commission proposal for a Council regulation determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, made on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, doc.ref. A3-0193/94. That report was adopted in 21 April 1994 by the Legislative Resolution embodying the opinion of the European Parliament on that Commission's proposal, OJ C 128/350 of 9/5/94.

issue of uniform visas, that it establishes the abolition of national visas after a transitional period and that it provides a detailed definition of visas.

On the other hand, a restrictive interpretation of the powers conferred on the Community by Article 100C is believed to correspond to that of the governments of some Member States.[170] It denies EC competence to establish a positive list of visa countries and to provide for mutual recognition of visas. These aspects are believed to be part of a more general visa and immigration policy that would not fit within the narrow limits of Article 100C. Such visa and immigration policy would rather be the subject of activities of cooperation under Title VI of the Treaty on European Union.[171]

The draft Regulation of the Commission on a list of visa countries was adopted by the Council on 25 September 1995.[172] Contrary to what the Commission suggested in that draft Regulation, the Council did not accept that the Regulation dealt with the positive list of visa countries,[173] nor with the mutual recognition of national visas. Subsequently, I will examine the legal validity of this position, from the point of view of the Community competence on visas established by Article 100C. I will first analyse such competence as far as the "positive" list of visa countries is concerned. Secondly, I will examine whether the Community competence includes the possibility of ruling on the mutual recognition of national visas. Finally, I will also refer to the issue of transit visas and whether or not the Community has competence to regulate that aspect of visa policy.

(i) Article 100C(1) and the "positive" list of visa countries

-The Commission's view and its proposal

The draft Regulation proposed by the Commission reflects its interpretation of Article 100C. Article 1(1) of the draft Regulation, together with its Annex, would establish the so-called "negative list". Article 1(2) of the proposal for Regulation provided that:

> "Until 30 June 1996 Member States shall decide whether to require visas of nationals of third countries not listed in the Annex. Prior to that date the Council shall decide according to (...) Article 100C either to add each of those countries to that list or to exempt its nationals from visa requirements."

In other words, the Commission proposed the following general plan. During the initial period, from the adoption of the Regulation until 30 June 1996, there would be only a EC negative list. The nationals of countries (or territories) included in that list would be required to have a visa by all Member States. However, some Member States could decide to ask for visas from nationals of some other countries. They could do so during the first period. The single restriction to this situation, mentioned only in the Preamble of the draft Regulation, is that such visa requirement will "not give rise to controls contrary to Article

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170 Hailbronner, Kay, "Visa regulations and third country nationals in EC law", *CMLRev*, Vol.31, 1994, No.5, pp.969-995, op.cit., at 974.

171 See O'Keeffe, "The new Draft...", op.cit., pp.146-147 and 149.

172 Council Regulation (EC) No.2317/95, quoted above.

173 See, e.g., Article 2(1) of the Regulation (EC) No.2317/95, quoted above.

7A".[174] In any case, during the first period two parallel visa regimes would co-exist: the EC regime, the same in all Member States, and the national regimes, eventually different in each Member State.

During the following period, only the EC regime would exist. Before 30 June 1996, the end of the first period, the Council would make a list specifying the countries and territories whose nationals would be required to have a visa to cross the external frontiers of the Member States. Such a list would be identical for all Member States and would be the sole legal instrument on the subject. Member States could not require a visa from a person who was not a national of a country included therein. Therefore, such a list, although negative (in the sense that it defines the persons who cannot enter without a visa), would also define a positive list. The positive list would be defined implicitly, or a contrario sensu: the persons not mentioned in the negative list would automatically be allowed to enter without a visa.

In the Explanatory Memorandum the Commission explained that:

> "Ideally [it] would have wished at this stage to place every third country either on the negative list or on a "positive list" of countries whose nationals are to be exempted from visa requirements. (...) However, this proved impossible in view of the very large number of countries for which the practices of the Member State diverge and the sensitive nature of the decision to be taken with respect to many of these countries."[175]

Accordingly, the Commission proposed the transitional regime, which, in its own words, was to be

> "only applicable for a strictly limited period of time, whereupon each third country must be governed either by the positive or the negative list."[176]

The underlying interpretation of Article 100C reflected in the Commission's plan is obvious: Article 100C entitles the Community to enact a negative and a positive list. It is not suggested that the positive list enter in force immediately only because of political reasons. The transitional phase is clearly entailed by the exclusive character of the reference made by the Commission to the negative list of visa countries. According to the Commission's interpretation of Article 100C, the transitional phase is a kind of derogation of the established Treaty rules. It is a concession to allow Member States to adapt progressively to the new and exclusive Community powers on the matter. Moreover, according to the Commission proposal, before 30 June 1996, the Council would approve the positive list which, in principle, would enter into force after that date. Naturally, it is not by mere chance that, according to Article 100C, after 1 January 1996 decisions on the list will be adopted by qualified majority. The Commission's proposal of a transitional phase was also made with an eye to the future change to the voting procedure in the Council.

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[174] A definition of the Court of Justice of what Article 7A imposes in this respect is still expected in the pending case C-445/93, Parliament v. Commission. Therefore, the precise effect of the reference of the draft Regulation can only be definitively interpreted after the Court's ruling on the matter.

[175] Explanatory Memorandum of the Commission on the draft Regulation, p.3.

[176] Idem, p.4.

-Analysis of Article 100C

Now Article 100C will be examined in an attempt to further the analysis of the Commission's proposal in terms of its underlying interpretation of Article 100C, as well as to analyse properly the criticism made of the Commission.

First, in interpreting Article 100C, its **wording** will be examined. Next, the provision will be put in **context**, within the general legal framework of the Union and of the scheme of the EC Treaty alone. Then, some **historical** elements will be recalled. Finally, a general **conclusion** will be made together with some ideas for the future solution of the controversy.

The following analysis of Article 100C will concentrate on looking for the precise character of the list referred to in Article 100C(1). This will inevitably entail the search for an accurate interpretation of that provision in general terms. That search may be useful, for instance, with respect to the controversy over EC competence under Article 100C to rule on the mutual recognition of visas. However, this aspect will be examined at a later stage, only. Furthermore, the discussion concerning the eventual duty of the Community to act in this field, and its exclusive (or not) power will not be expressly dealt with here, although this issue may arise from the present analysis of Article 100C. The reader is therefore warned that the following analysis is not meant to answer all doubts over Article 100C, if indeed it answers any at all.

Wording of the provision

The wording of Article 100C(1) does not provide an unequivocal meaning of the provision. To a certain extent, this is precisely the origin of the problem.

The interpretation of the Commission, however, is that Article 100C includes the power to adopt a negative and a positive list. It has stated that:

> "Manifestly, this is what is contemplated by Article 100C.(...) By providing that the Council is to '*determine* the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States' Article 100C necessarily implies that the Council must also determine which third countries are to be exempt from a visa requirement. The contrary view cannot be reconciled either with the letter or with the spirit of this provision."[177]

While the "spirit" will be considered later, it seems difficult to draw from the letter of the provision any meaningful conclusions. In an attempt to draw some meaning from that wording, we could, for instance, stress the significance of the references to "the third countries" or to "the external borders of the Member States", arguing that by definition they exclude any autonomous action by the Member States. However, it seems impossible to base any unequivocal conclusion as to its meaning on these phrases, or on any part of the wording of the Article.

Nor does it seem possible to draw unambiguous conclusions from a comparison of the wording of Article 100C(1) with that of Article 16 of the previous draft Convention of the External Frontiers, made by the ad hoc immigration group. The latter Article envisaged the adoption of a negative and a positive list, as it referred explicitly to nationals who would require a visa to enter a Member State and also to those who would not. Nevertheless, such difference in the wording of the two provisions does not necessarily

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[177] Ibidem, p.3. Emphasis added by the Commission's text.

mean that they have different intentions and in particular that Article 100C(1) excludes the elaboration of a positive list.

The search for the precise meaning of Article 100C has to proceed beyond its wording. In search for the "spirit" of the Article, we may analyse its place within the general legal framework of the Union (of the Treaty on European Union), and within that of the Community (in the EC Treaty).

System of the Union

Within the general legal framework of the Union, Article 100C has to be considered in relation to the provisions of Title VI of the Treaty on European Union, envisaging cooperation regarding "conditions of entry and movement of nationals of third countries on the territory of the Member States".[178] In the final version of the Maastricht Treaty, the drawing of the list of visa countries and the definition of the uniform visa format are the only cases of (explicit) Community competence, in stark contrast to the Union general competence on third country nationals, under the third pillar. It is important to recall this fact in order to refute the general assertion made by the European Parliament that Article 100C "actually provides for harmonisation of visa policy".[179]

A further point, or perhaps another aspect of the same point, regards a search for the sense of Article 100C in relation to the establishment of the internal market. It has been said that there is a close relationship between Article 100C and Article 7A of the EC Treaty and, in general terms, the establishment of free movement of persons in the internal market.[180] This has been used as an argument to justify a broad interpretation of Article 100C and thus the Community competence under the latter to draw a positive list of visa countries. According to this reasoning, only this broad interpretation would make sense, given the close relationship between Article 100C and the EC Treaty provisions on the establishment of the internal market.

However, the obvious intention of the drafters of the Treaty on European Union in dividing the explicit competences on visa policy between the Community (Article 100C) and the Union (under its Title VI) cannot be forgotten in this respect either. As already noted, it is important to emphasise, for instance, that Article K.1 of the Treaty on European Union states that the cooperation envisaged in Title VI has the aim of "achieving the objectives of the Union, in particular the objective of free movement of persons". As this freedom of movement is an essential part of the internal market, the

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178 Defined as an area to be regarded as a matter of common interest by Article K.1(3)(a).

179 See the explanatory statement of the Froment Meurice Report, of 29 March 1994, p.16, referred to supra. See also Hailbronner, op.cit., p.973, who states that "[p]rocedurally Article 100C covers only some aspects of a common visa policy".

180 See Hailbronner, who states e.g. that: "[c]onsidering the Internal market and freedom of movement objectives of the Treaty, a solution seems hardly to be acceptable which either would require the establishment of new types of border control or which would seriously undermine the idea of a common external border regime. The abolition of internal border controls alone leads to the conclusion that a distinction between positive and negative listing cannot be maintained. It would be hard if not impossible to imagine how a system exclusively based on negative listing could function properly." See Hailbronner, op.cit., at p.986. I answer this view in the main text. Note, in any case, that Hailbronner makes in general a quite balanced analysis of Article 100C and often seems to avoid making definitive legal conclusions on the interpretation of that provision, referring often to the practical functioning of the rules. See also the Froment Meurice Report, of 29 March 1994, p.15, and specially point 2.1 of its explanatory statement.

search for the sense of Article 100C within the establishment of the internal market cannot be limited to the EC Treaty.

As we have seen, in the search for the precise meaning of Article 100C we cannot forget that the competences granted by it to the EC are small exceptions to the Union competence on third country nationals in the third pillar. Furthermore, Title VI of the Maastricht Treaty is also supposed to contribute to the free movement of persons and the establishment of the internal market.

These points may reduce the arguments in favour of a broad interpretation of Article 100C. However, while they would appear to reinforce a restrictive interpretation of Article 100C (one that denies EC competence to draw a "positive list" of visa countries), in fact they do not tell us the precise reason why Article 100C should be interpreted in a restrictive way. The precise extent to which Article 100C was supposed to contribute to the objective of establishing a true internal market still remains to be determined.

Furthermore, there are repeated reservations in the Treaty on European Union and in its Title VI establishing that its rules are "without prejudice to the powers of the Community".[181] Therefore, reference has to be made to the position of Article 100C within the EC Treaty.

Scheme of the EC Treaty

In the context of the legal framework of the Community, Article 100C may be put in relation to other provisions of the EC Treaty that are relevant for the building up of a situation of true free movement of persons. In particular, it has to be put in relation to Articles 100 and 235, which it can never substitute.[182] Pursuant to these Articles, the Community could draw a positive list of visa countries, but only (until a future change to the EC Treaty) by a unanimous vote in the Council. While, in itself, this does not necessarily exclude a broad interpretation of Article 100C and EC competence to draw a "positive list", it nevertheless reminds us again that Article 100C is not the only EC Treaty provision on which the implementation of the visa aspect of the internal market may be based. This is not, however, sufficient evidence on which to make a convincing interpretation of Article 100C. Some historical elements will now be recalled as an aid to achieving such an interpretation.

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181 Article K.1, referred to supra, says that "Member States shall regard [certain] areas as matters of common interest", "without prejudice to the powers of the European Community". Article M of the Treaty on European Union provides that, except for the amending provisions, "nothing in this Treaty shall effect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying them". Article B of the Treaty on European Union refers to the fact that one of the objectives of the Union is to "maintain in full the *acquis communautaire* and build on it with a view to considering [in the Intergovernmental Conference of 1996] to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community."

182 Furthermore, as O'Keeffe recalls, according to Article K.9 the Council can also propose to the Member States to apply Article 100C to action in the areas referred to in Article K.1(1) to (6), thus explicitly enlarging the Community competence. See O'Keeffe, "The new Draft...", op.cit., p.140.

Historical aspects - the proposals preceding the final version of Article 100C

It seems clear that the authors of the Maastricht Treaty wanted to grant the EC competence for some aspects of the visa policy, while leaving others for cooperation between Member States under the "third pillar". The precise distinction between the aspects of each pillar is, to a certain extent, what is at stake. Below, in section B, I recalled some of the proposals presented during the Intergovernmental Conferences that led to the signature of the Treaty on European Union.[183]

Here I will refer only to the proposal on the table which preceded the final version of that Treaty. That proposal was the Dutch presidency's "draft Union Treaty", presented on 8 November 1991.[184] In a proposed new Article 100C of the EC Treaty, it granted the Community explicit competence to deal with all aspects related to "the rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon" and with "the general conditions governing authorised entry to and movement" within the EC by third country nationals - "including the determination of the travel requirements required for crossing the external borders of the Member States". The Community competence on the entry and movement of third country nationals for short stay included specifically the determination of "the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States" and the adoption of "measures relating to the introduction of a uniform visa."[185] Meanwhile, the Cooperation between Member States "in judicial and home affairs" could not even operate in that field.

As noted above, Germany supported this Dutch proposal, but the United Kingdom opposed it with success. In the end, a compromise was reached, by which the Community was given competence only to draw the list of countries referred in Article 100C and to define the uniform format for visas.

Does this recollection help us in the search for the precise intentions of the Treaty drafters? One very interesting point is that it seems clear that, in the last Dutch proposal, the competence given by Article 100C to draw the list of visa countries included also the competence to draw a positive list. Crossing of external borders, entry and visa policy for

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183 See Corbett, op.cit., at pp.219-379.

184 See also Bull.EC, 9/1991, point 1.1.4., p.11.

185 As recalled supra, in section A, Article 100C of that proposal had the following text: "1. The Council, acting unanimously on a proposal of the Commission or on the initiative of any Member State, and after consulting the European Parliament, shall adopt the Directives relating to the approximation of the laws, regulations and administrative provisions of the Member States which concern the following areas, to the extent that such approximation is necessary to ensure the free movement of persons within the internal market: (a) the rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; (b) the general conditions governing authorised entry to and movement within the territory of the Member States as a whole by nationals of third countries for short stays, including the determination of the travel requirements required for crossing the external borders of the Member States. The Council shall, in a manner laid down in the previous paragraph, [unanimously] decide which of the decisions are to be taken by a qualified majority. 2.The Council, acting by a qualified majority, on a proposal from the Commission or on the initiative of any Member State, and after consulting the European Parliament, shall: - determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States; - adopt the measures relating to the introduction of a uniform visa."

short stays were to be wholly and uniquely a Community matter.[186] The reference to Community competence over a uniform visa only confirms the idea of general Community competence on visa policy.[187] In the final version of the Treaty on European Union, the Community was granted no general competence on entry and movement for short stay, nor on the uniform visa. Instead, the Community was given competence only with respect to the uniform format for visas and the list of visa countries. As the reference to the latter used exactly the same wording as the last Dutch proposal, it seems legitimate to presume that it was meant to have the same substantive content as before, including, therefore, the competence to draw a positive list.

Conclusion

Article 100C is certainly not very clear as to whether it grants, or not, the EC competence to draw a list of countries whose nationals can enter the Community without a visa. The present author tends to favour a relatively broad interpretation of Article 100C in this respect, according to which this provision gives the Community competence to draw a positive list of visa countries. This interpretation seems to be the only one that takes into account two important facts. First, the wording of the reference to the EC competence to draw the list, made in the final version of Article 100C(1), which repeats *ipsis verbis* the reference made in the last Dutch proposal,[188] granting the Community competence to draw a positive list. Secondly, the EC competence under Article 100C on the list of visa countries is the sole substantive exception to the Union competence on third country nationals under Title VI of the Maastricht Treaty. Consequently, one may presume that it was meant to be given full effect and not to be interpreted in a restrictive manner.

In any case, this issue seems likely to raise practical problems only if, after 1st January 1996, it proves possible to form a qualified majority in the Council to adopt a positive list of visa countries. However, it does not seem very likely to occur. The Council has expressed a quite narrow interpretation of the Community competence granted by Article 100C, as in the case of transit visas to be mentioned below.

It is submitted that a definitive solution for the controversy on this point could be one of a mixed legal and political nature. First, the Regulation adopted by the Council in September 1995 could perhaps be maintained in force until new constitutional rules are adopted. Moreover, a clarification of the relevant Treaty rules should be made in the next Intergovernmental Conference. This would be a preferable course to making the matter becoming the object of a dispute in the Court of Justice.

(ii) Article 100C and the mutual recognition of visas

As referred to before, Article 2 of the Commission's draft Regulation provided for the mutual recognition of visas "valid throughout the Community". However, the mutual

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186 According to Article 100C(1) of that proposal, quoted supra.

187 Note also that the specification of competence on the list of visa countries, made by Article 100C(2) of the last Dutch proposal, was not meant to add new competences to those already provided in Article 100C(1) of the same proposal, but merely to provide for a different voting procedure in the Council: by qualified majority.

188 First indent of Article 100C(2).

recognition of visas between Member States is not expressly envisaged by Article 100C or any other provision of the EC Treaty. Neither is the issue of visas with validity for all the Community. Thus the question arises as to the legal basis of such a rule in this draft Regulation.

According to the Commission, "the mutual recognition by Member States of visas issued by each other" "is necessary to give full effect to Article 100C" and "is an essential accompanying measure for the achievement of the objective set out in Article 7A as regards the free movement of persons."[189] The Commission uses here a sort of implied power argument, which could be thought to have some legal background in the joined cases Germany et al v. Commission.[190] There, the Court of Justice considered that, since Article 118

> "confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and *per se* the powers which are indispensable in order to carry out that task."[191]

However, the matter under review here is quite different from the one at stake in that case. The latter case concerned the power of the Commission to promote close cooperation. The Commission was the only institution that could be responsible for promoting such cooperation within the Community. Besides, that cooperation was to be developed wholly under one single legal framework - that of Article 118 of the EC Treaty. In the present case we are dealing with an eventual direct imposition of a legal rule (the mutual recognition of visas) and within a field where the competence is divided between the Community and the third pillar. Therefore, the comparison has to be treated extremely cautiously.

Meanwhile, to corroborate the Commission's view, Hailbronner adds another argument:

> "A uniform format of visas does serve a useful purpose only to the extent that visas issued by other Member States are recognised as mutually valid. It can hardly be assumed that a common visa format is to be introduced simply for psychological or decorative purposes."[192]

However, as argued before, to a certain extent that may have been exactly the intention of the Treaty drafters: to grant the Community competence related to third country nationals on a quite secondary and formal matter in order precisely to disguise the lack of agreement on granting to it more substantial competence in that field.

Furthermore, we may also imagine that the introduction of a common visa format could have simply had the intention to prepare the way for the introduction of a uniform visa. The latter point is not (or at the very least not expressly) mentioned by Article 100C. It is included under the Union competences in Title VI. Furthermore, Community competence over uniform visas (and therefore on their mutual recognition) was suggested

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189 Second considerandum of the Preamble of the draft Regulation.

190 As pointed out by Hailbronner, op.cit., at pp.986-7.

191 Cases 281,283-5 & 287/85 Germany et al. v. Commission [1987] ECR 3203, at 3253, paragraph 28. This is generally regarded as a use of the doctrine of implied powers. See Hartley, Trevor "The Commission as Legislator under the EEC Treaty", *ELR*, Vol.13, April 1988, No.2, pp.122-125, at p.124. See supra, chapter 2, for an analysis of the case.

192 Hailbronner, op.cit., p.988.

by the Dutch proposal and clearly rejected during the intergovernmental conferences that led to the Treaty on European Union. It does not seem logical to exclude Community competence to draw rules on the issue of uniform visas and to include implicitly in Article 100C the EC competence to impose the mutual recognition of visas.

Finally, in what relates to the argument that the mutual recognition of visas is coherent with the rules on the establishment of the internal market,[193] the reader is referred to the analysis of Article 100C above. There, it was argued that the rules of the third pillar have to be taken into account when searching for the meaning of Article 100C within the (Union and Community) rules for the establishment of the internal market. Therefore, it is submitted that an interpretation that reads into Article 100C a Community competence to rule on mutual recognition of visas does not conform with the intentions of the drafters of the Maastricht Treaty nor with the division of competences on visas between its Title VI and the amended EC Treaty.

In any case, the mutual recognition of Article 2 "applies only to visas which are valid throughout the Community". The Commission recognises that the issue of the latter "is governed by the External Frontiers Convention."[194] As will be mentioned in the next chapter, the draft Convention provides for the issue of uniform visas for the whole Community and for their mutual recognition. In particular, Article 2 of the draft Regulation, on the mutual recognition of visas "valid throughout the Community", seems to be substantially identical to Article 18 of the draft External Frontiers Convention, which establishes that:

> "A Member State shall not require a visa issued by its own authorities of a person applying to stay for a short time within its territory who holds a uniform visa".

Therefore, the mutual recognition of visas, even for those who accept its inclusion in the draft Regulation, would necessarily require the entry into force of the External Borders Convention and would be dependent on its provisions. Hailbronner even states that "[i]f this condition is taken into account, objections against Article 2 of the draft Regulation are hardly convincing".

However, it could also be said that such a condition can, at most, only diminish the practical importance of the controversy over the matter, but not the real pertinence of the objections to EC competence. It can still be maintained that the Community has no competence under Article 100C to establish the mutual recognition of visas. Would it not be strange that the Community would have competence on mutual recognition of visas, but no competence as to their issue? Additionally, what is the special reason that could justify a Community instrument giving legal force to a provision of a Convention between the Member States?

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193 Hailbronner, op.cit., p.987, who sustains that "[i]n the case of a visa valid throughout the Community, the Internal market concept indeed does support the view that mutual recognition is implied in Article 100C". It may be implied, but it does not mean that such provision gives the Community the power to rule on the mutual recognition of visas, especially when it is recognised that the EC has not competence to rule on the issue of visas valid throughout the Community.

194 It adds that "Member States could not be expected to recognise visas granted by each other without a minimum harmonisation. Otherwise the Member States would lay themselves open to the abusive practice of 'visa shopping'." See the Explanatory Memorandum of the Commission on the draft Regulation, p.4.

(ii) Article 100C and transit visas

A final point must be made in regard to transit visas. The Justice and Home Affairs Council has adopted a list of third countries whose nationals have to hold a visa when they travel through a Member State in transit to a third country.[195] This topic was dealt with under Title VI of the Treaty on European Union, and not under Article 100C of the EC Treaty. The argument given for this matter to be treated within the third pillar was that the visas in question did not concern third country nationals authorised to cross the external frontiers of the Member States.

This argument is a clear mystification of the real situation in question. It is clearly the case that a third country national has to cross the external frontiers of Member States to be in transit through them from one third country into another. If the third country national concerned is authorized to transit through a Member State to go to another country, he or she has to be authorised to cross its borders. Even if the authorised crossing of the Member State frontiers is concretely restricted in time and space to what is necessary for the purposes of transiting to another third country. Therefore, it is a matter included under Community competence under Article 100C to decide in the list of countries whose nationals have to hold a visa for the sole purpose of transit to another third country. It is a violation of Community competence to rule on this topic under the framework of Title VI.

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[195] Decision of the meeting of the Justice and Home Affairs Council of 23 November 1995, see *MNS*, December 1995.

2 - The Protocol and the Agreement on Social Policy[196]

One of the major innovations brought by the Treaty on European Union, as far as third country nationals are concerned, was the Agreement on Social Policy, annexed to the Protocol on Social Policy. This Protocol was concluded by all the Member States. It authorises all Member States,[197] except the United Kingdom, to have recourse to the institutions and mechanisms of the EC Treaty to implement the Agreement on Social Policy. This Agreement reflects the wish of other Member States for joint progress in the social area, in spite of persistent British opposition.[198] The Agreement creates more possibilities for cooperation and adoption of common measures than those provided by the Community. The relevance of the Agreement for the purposes of this thesis lies in the fact that it provides for the possibility of adopting Directives concerning "conditions of employment for third country nationals legally residing in Community territory".[199] The Directives may be adopted by the Council, deciding unanimously on a proposal from the Commission, upon the consultation of the European Parliament and the Economic and Social Committee.[200]

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196 See Barnard, C. "A Social Policy for Europe: Politicians 1, Lawyers 0" in *International Journal of Comparative Labour Law and Industrial Relations*, Vol.8, 1992, No.1, p.15; Bercussson, B. "Maastricht: a Fundamental Change in European Labour Law", in *Industrial Relations Review*, Vol.23, Autumn 1992, No.3, p.177 and "The Dynamic of European Labour Law after Maastricht", *Industrial Law Journal*, Vol.23, March 1994, No.1, p.1; Watson, Philippa "Social Policy After Maastricht", *CMLRev*, Vol.30, 1993, No.3, pp.481-513; and Whiteford, Elaine A. "Social Policy After Maastricht " *ELR*, Vol.18, June 1993, No.3, pp.202-222.

197 Austria, Finland and Sweden acceded also to the Agreement on Social Policy.

198 Note, however, that for some time it looked as if the UK almost risked ending up being a party to the Social Protocol. Until the attainment of final ratification of the Maastricht Treaty, there was always a real, although small, possibility of that happening. The Labour Party kept proposing in Parliament the UK participation in the Social Protocol. Occasionally that possibility enjoyed the support of Tory *Euro-sceptic* MP's, trying to prevent the ratification of the Treaty as a whole. In May 1993, the UK government, trying to overcome the difficulties in the ratification, even said it could accept the amendment presented by the Labour Party, *Agence Europe* of 7 May 1993, No.5975 (n.s.). However, this was only a tactical move soon forgotten, one of many episodes in the battle for ratification of the Treaty. On 23 July 1993, a vote in the House of Commons calling for the acceptance of the Protocol was defeated by the margin of one single vote (318 to 317). The decisive vote was that of Betty Boothroyd, the Speaker of the House of Commons, obliged to cast her vote as the initial vote was even. It seems that she voted in favour of the government's position to obey the convention that the Speaker votes in line with the government. In fact she was elected as a Labour Party candidate. Nevertheless, in the end, the government succeeded in having the support of a bigger majority in Parliament. The formal instrument of the UK ratification was handed down on 2 August 1993, quite a while before the German one. For a detailed review of the events leading to the UK ratification see Baker, D., Gamble, A. & Ludlam, S., "The Parliamentary Siege of Maastricht 1993: Conservative Divisions and British Ratification", *Parliamentary Affairs*, Vol.47, 1994, No.1, pp.37-60. See also by Baroness Elles, "UK Constitutional and Parliamentary Aspects of the Maastricht Treaty", *Legal Issues of the Maastricht Treaty*, op.cit., pp.341-348.

199 See Article 2(3) of the Agreement annexed to the Protocol. The Directives will define "minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States" - Article 1(2) of the same Agreement.

200 To be more accurate, the decision-making procedure to be applied is that of Article 189C of the EC Treaty, which gives quite limited powers of intervention to the European Parliament.

Whether or not the Agreement on Social Policy is part of Community Law is a matter of some controversy. I agree with those who believe that the Agreement is part of the EC Treaty.[201] An important argument in favour of this position is that the Agreement is annexed to the Protocol, and the latter is part of the EC Treaty.

It has also controversial whether the normal procedure provided by the EC Treaty, or that provided by the Agreement should be followed, for the adoption of a specific measure in the social area.[202] The most attractive position is that of the Economic and Social Committee, according to which, if a measure is ultimately going to be adopted under the Agreement, the procedure provided by the latter must have been followed.[203] According to Article 3(2) of the Agreement, this means that social partners must have been consulted.

The problem of what procedure to use derives from the fact that, already before the Treaty on European Union, the Community had competence to act in the fields covered by the Agreement. That competence was, and still is provided by provisions of the main text of the EC Treaty. As argued in chapter 2, as far as the employment conditions of third country nationals are concerned, the Community had competence to adopt measures under Article 100 and 235 of the EC Treaty.[204] However, that competence was not used. In this respect, the Agreement on Social Policy introduces an explicit Community competence to act on employment conditions of legally resident third country nationals. It is now more than clear that the Community, under the Agreement, may adopt measures in this area. The problem is that, until the present moment, no legally binding measure related to third country nationals has been adopted by the Council under the Agreement.[205] It

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201 In favour see Bercusson, *Industrial law Journal*, op.cit., at p.2 (with reference to the opposite opinion); Sciarra, Silvana, "Social Values and the Multiple Sources of European Social Law", *European Law Journal*, Vol.1, 1995, No.1, pp.60-83, at 70 (with reference to various literal and contextual elements); and Whiteford, op.cit., p.204.

202 See the contrasting views of the Commission and the Economic and Social Committee expressed in the Commission Communication concerning the application of the Agreement on Social Policy presented by the Commission to the Council and to the European Parliament, COM (93) 600 final of 14 December 1993 (in particular its point 8); and in the Economic and Social Committee Opinion on the latter Commission communication, CES (94) 1310, of 24/11/1994 (point 1.4).

203 See the Economic and Social Committee Opinion referred in the preceding note, CES (94) 1310, at point 1.4.4.

204 See also Whiteford, who argues that Article 2(3) of the Agreement on Social Policy introduces "largely nothing new" in terms of Community objectives. See Whiteford, op.cit., at 206.

205 See, however, that in the framework of the social dialogue, representatives of the European social partners adopted in Florence, on 21 October 1995, a declaration on the fight against racism and xenophobia at work, see Agence Europe No.6590, of 23-24/10/1995. Under the new rules of the Agreement on Social Policy (Article 4) management and labour may conclude agreements, which, in matters covered by Article 2 of the Agreement, may be implemented by a Council decision. Thus, although this seems unlikely to occur in the near future, under the Agreement on Social Policy it is possible for social partners to enter into agreement at a European level on the fight against against racism and xenophobia at work, and it is possible for the Council to make such an agreement binding at the joint request of the signatory parties. On the new possibilities brought by the Treaty on European Union for conclusion of collective agreements at an European level, see Bercusson, Brian, "The Collective Labour Law of the European Union", *European law Journal*, Vol.1, 1995, No.2, p.175. On the fight against racism at work, see Wrench, John, *Preventing Racism at the Workplace in the European Union*, Dublin, European Foundation for the Improvement of Living and Working Conditions, 1995.

seems that the governments of the Member States give preference to the third pillar to deal with issues related to third country nationals.

3 - Union Citizenship[206]

The Treaty on European Union introduced in the EC Treaty the new Articles 8 to 8D, which established a Union Citizenship.

Those provisions provide for the following rights for a Union citizen:

- the right to move and reside freely within the territory of the Member States,
- the right to vote and to stand as a candidate for municipal elections and elections for the European Parliament, in the Member State where he or she resides,
- the right to have protection from the diplomatic or consular authorities of any Union Member State, in a third country in which the Member State of which he or she is a national is not represented,
- the right of petition to the European Parliament, and
- the right of application to the European Ombudsman.

Almost none of these rights entered into force immediately with the entry into force of the Treaty on European Union. The right to free movement and residence is to be enjoyed subject to the limitations and conditions laid down in the EC Treaty and in the Treaty on European Union, and by the measures adopted to give effect to it.[207] That is to say: no new rights of free movement were created by virtue of the simple entry into force

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206 See Anderson, Malcolm, Den Boer, M. & Miller, G. "European Citizenship and Cooperation in Justice and Home Affairs" in *Maastricht and Beyond- Building the European Union*, Duff, A. , Pinder, J. & Pryce, R. (eds.), London, Routledge, 1994, pp.104-122; Baccelli, Luca "Citizenship and Membership", paper presented in the 17th IVR World Congress on "Challenges to Law at the End of the 20th Century", Bologna, 16-20 June 1995; Closa, C. "The concept of citizenship in the Treaty on European Union", *CMLRev*, Vol.29, 1992, No.6, pp.1137-1169, and "Citizenship of the Union and nationality of Member States", *CMLRev*, Vol.32, 1995, No.2., pp.487-518; Gardner, J.P. (ed.) *Hallmarks of Citizenship - A Green Paper*, London, The British Institute of International and Comparative Law, 1994; Groulx, Richard "M.Foucault or 'Governamentality' and Citizenship", paper for the IVR Congress; Habermas, Jürgen "Citizenship and National Identity: Some Reflections on the Future of Europe", *Praxis International*, Vol.12, April 1992, No.1, p.1, and "The European Nation State - Its Achievements and Its Limits. On the Past and the Future of Souvereignty and Citizenship", paper for the IVR Congress; Jessurun d'Oliveira, H.U., "European Citizenship: Its Meaning, Its Potential", *The Maastricht Treaty on European Union...*, op.cit., pp.81-106, and "Union Citizenship: Pie in the Sky?", in *A Citizens' Europe - In Search of a New Order*, Rosas, Allan & Antola, Esko (eds.), London, Sage, 1995, pp.58-84; Koslowski, Rey "Intra-EU Migration, Citizenship and Political Union", *JCMS*, Vol.32, September 1994, No.3, pp.369-402; Moura Ramos, R. M., *Les Aspects Nouveaux de la Libre Circulation des Personnes: vers une Citoyenneté Européenne; Questionnaire, Rapport Général et Conclusions*, XV Congrès de la Fédération Internationale pour le Droit Européen (held in Lisbon on 23-6 September 1992), Lisbon, 1994, pp.1-92; O'Keeffe, David "Union Citizenship", in *Legal Issues of the Maastricht Treaty*, op.cit., p.87, and "Citizenship of the Union" in *Actualités du Droit*, 1994, No.2, p.227; O'Leary, Siofra *The Evolving Concept of European Citizenship, From the Free Movement of Persons to Union Citizenship*, Ph.D. thesis, EUI, 1993, and Dordrecht, Martinus Nijhoof, forthcoming; O'Leary, S., "The relationship between Community citizenship and the protection of fundamental rights in Community law", *CMLRev*, Vol.32, 1995, No.2., pp.519-554; and Rosales, José Maria & Carracedo, José Rubio "To Govern Pluralism: Towards a Concept of Complex Citizenship", paper for the IVR Congress.

207 Article 8A(1) of the EC Treaty.

of the Treaty on European Union. As far as political rights at local and European level were concerned, it was provided that they would be exercised according to instruments to be adopted by the Council before the end of 1994 and 1993, respectively.[208] The end of 1993 was also the deadline for agreement between Member States on diplomatic protection. As far as the Ombudsman was concerned, the Parliament had to establish the regulations and conditions governing the performance of his duties,[209] and had then to appoint him.[210] Only on 27 September 1995 did he take the oath before the Court of Justice and did he start to work, almost two years after the entry into force of the Treaty on European Union. Only the right of petition to the European Parliament was meant to be enjoyed simply because of the entry into force of the Treaty on European Union. However this right was not a novelty, since before that Treaty the European Parliament already received petitions.

The Union Citizenship is, in any case, an exclusive privilege of nationals of a Member State of the European Communities. The new Article 8 of the EC Treaty provides that:

> "Every person holding the nationality of a Member State shall be a citizen of the Union".[211]

Therefore, third country nationals, even if legally resident in the Community for a long time will have no chance of acquiring directly Union Citizenship. First they will have to get the nationality of a Member State. The only rights that third country nationals were granted by the Treaty on European Union were the right to address a petition to the European Parliament and the right to make complaints to the Community Ombudsman. Articles 138D and 138E define the beneficiaries of those rights as:

> "any citizen of the Union or any natural or legal person residing or having his registered office in a Member State".

It is certainly a positive fact that third country nationals were granted these rights. However, the problem is that these rights are not substantive, but mere procedural rights. They allow third country nationals to seek protection and promotion of their substantive rights, on which the Treaty on European Union did not introduce anything novel.

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[208] See the Directive 93/109/EC, on the right to vote and to stand as a candidate at the European Parliament, approved at the "General Affairs" Council of 6 December 1993, OJ L 329/34 of 30/12/93. The deadline for its implementation was 1/2/1994. On 28 February 1994, the Commission presented its draft Directive on the right to vote and to stand as a candidate in local elections for European Union citizens, COM (94) 38 final, OJ C 105/8-13. It was adopted on 19 December 1994 as Council Directive 94/80/EC, OJ L 368/38 of 31/12/1994. It is to be implemented by 1/1/1996. On this topic see also the Commission Report on the Citizenship of the Union, COM (93) 702 final of 21/12/93.

[209] With approval of the Council, acting by qualified majority. See Article 138 E (4) of the Treaty of Rome, as amended by the Treaty on European Union. The regulations and general conditions governing the performance of the Ombudsman's duties, were approved by Decision of the European Parliament of 9 March 1994, after the Council had given its consent to them, OJ L 113/15-18 of 4 May 1994.

[210] After a long and complex procedure, the European Ombudsman was appointed on 12 July 1995. He is Mr. Jacob Söderman, the previously Finnish Ombudsman. On the difficulties to appoint an Ombudsman see Magliveras, Konstantinos "Best intentions but empty words: The European Ombudsman", *ELR*, Vol.20, August 1995, No.4, pp.401-409.

[211] Note also that a declaration, made by the representatives of the Member States that concluded the Treaty on European Union, states that "the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned".

This situation is open to criticism. The fact that Union Citizenship is reserved for nationals of Member States only, seems to be particularly unfair, and negative in more general terms. It is unfair since third country nationals, who have a close relationship with one Member State, will not have the same rights there as other foreigners having a less close relationship with that country. The latter foreigners will have more rights simply because they have the nationality of a Member State. It is negative in the sense that it reinforces the exclusion of such non-nationals from the society where they live and from the political and cultural evolution in course in that society.

In this respect, the proposals of the European Parliament were more ambitious than the final draft of the Treaty on European Union. Politically cautious, the Parliament did not propose the attribution to third country nationals of Union Citizenship as such. Nevertheless, it proposed that a wide range of rights be granted to "Union citizens and their families and, under conditions laid down by a Union law, other persons resident in a Member State(...)".[212] Those rights would include not only "the right to move and reside freely throughout the Union" and "to exercise any professional or economic activity without discrimination", but even "the right to exercise any lawful activity on the same terms as citizens of the Member Sates concerned". Accordingly, the Union would have to remove legal obstacles to the effective exercise of that freedom and would conduct a policy aimed at removing other existing obstacles."[213] The Parliament proposal envisaged a common definition of the "notion of persons resident in the Union", which would also include third country nationals.[214] This definition would be adopted by the Council, acting unanimously, on a proposal from the Commission and with the assent of the European Parliament. Then, instruments would be adopted defining "the criteria for admitting resident aliens to economic and professional activities in the Union as a whole". For persons satisfying that criteria, legislation would provide for equal treatment with Union citizens, "including the same conditions of employment". Finally it would also "determine the political rights of aliens".[215]

It may be recalled that usually fears are raised that if free movement was granted to third country nationals, coming from other Member States, there would be a sudden invasion of Member States by those persons. These fears are exaggerated. But, in any case, we could easily imagine a formulation of the conditions of acquisition of Union Citizenship that could put allay these fears. It would be enough to make citizenship conditional on long-term legal residence in Member States: for example for a period of 10 or 15 years. A non-perfect solution would be preferable to a plain denial to third country nationals of even a slim chance of acquiring directly Union Citizenship.[216] The extension

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[212] Resolution of the European Parliament of 21 November 1991 on Union Citizenship, proposal No.1(i); OJ C 326/205 of 16/12/91.

[213] Idem.

[214] Or "aliens", as mentioned in the Resolution. Those include nationals of third countries and stateless persons resident in the Member States. Ibid., proposal No.4.

[215] Ibidem.

[216] Note that the Standing Committee of Experts on international immigration, refugee and criminal law, has proposed that Union citizenship be granted to a person "who has been lawfully residing in the territory of a Member State for five years", see Standing Committee of Experts, *Proposals for the amendment of the Treaty on European Union* ..., op.cit., p11.

of Union Citizenship to long term resident third country nationals could make a significant contribution to their social integration in Europe.

On the other hand, one should not overlook the limits of the substantial content of Union Citizenship and the present political context in Member States. At present, access to the nationality of each Member State remains more important than access to the Union Citizenship, in itself. Thus access to the former should be the priority. This is the reason why the issue of Union Citizenship for resident third country nationals was not dealt with in more depth in this thesis.

4 - Changes in some Community decision-making procedures

It is interesting to note some amendments introduced by the Treaty on European Union in Community procedures for decision-making. The procedure of Article 100 was changed. Now the consultation of the European Parliament and of the Economic and Social Committee is always required to adopt Directives under that provision. This was a small change. Yet, a more important change was made in Article 100A, on the approximation of provisions "which have as their object the establishment and functioning of the internal market". The new procedure established for approval of those measures is that of the new Article 189B: co-decision between the Council and the European Parliament. However, it should be kept in mind that, according to its second paragraph, Article 100A does not apply to provisions related to the free movement of persons, nor to the rights and interests of employed persons. Therefore, the change is of limited interest for the purposes of this thesis. It is, however, interesting to compare this change to the less significant change made to Article 100, the more important one for third country nationals. Under Article 100 the European Parliament has only the right to be consulted.

Article 59(2) should also be mentioned here. As previously recalled, it establishes the possibility of extending the provisions on free provisions of services to "nationals of a third country who provide services and who are established within the Community". This provision was not changed: its procedure continues to be the same. The Council may act by a qualified majority on a proposal from the Commission. No intervention of the European Parliament is envisaged. The absence of change in this procedure follows the general trend of the limited intervention of the Parliament in the decision making process concerning third country nationals. Nevertheless, this absence of change contrasts to the changes which have occurred in other provisions. In provisions dealing, for example, with freedom of movement of workers - Article 49 - and with freedom of establishment - Articles 54(2), 56(2) and 57(2) - the new procedure adopted was again the one established in Article 189B, a true co-decision between the Council and the Parliament.[217] In contrast, in Article 59(2), not even the procedure established by the new Article 189C

[217] Note that no other decision making procedure of the chapter on freedom of services was changed. However, one should recall that freedom to provide services was supposed to have been implemented (by the end of the transitional period) or is related to special fields governed by special rules of the EC Treaty - like transport and banking and insurance services.

(cooperation),[218] or that of the new Article 100 (mere consultation of the Parliament) were adopted. The lack of change in the procedure established in the second paragraph of Article 59 is consistent with the fact that it was never used. This latter fact confirms the political difficulty in adopting Community measures concerning nationals of third countries.

CONCLUSIONS

This chapter examined the legal and institutional framework introduced by the Treaty on European Union to deal with issues concerning third country nationals. The following chapter will analyse some Union activities already developed in this area under the new rules introduced by the Treaty on European Union. It will examine the activities concerned with control of external borders, admission of immigrants, and action against illegal immigration.

As far as third country nationals are concerned, the main novelty introduced by the Treaty on European Union was the creation, by its Title VI, of a framework for Cooperation on "Justice and Home Affairs". An assessment on this framework was already proposed at the end of section B, wherein it was emphasised that this framework is a middle way solution between the Community framework and that of the previous ad hoc intergovernmental cooperation. Some of the most criticisable aspects of the latter were not overcome. Cooperation under Title VI suffers from a serious lack of transparency, adequate parliamentary accountability and obligatory uniform judicial control. No balance of powers exists between the various intervening institutions. Undoubtedly the framework of Title VI is not a model for a democratic form of government.

It was also suggested that part of the institutional features of Title VI, notably its lack of transparency, can be explained by the wish of the governments of Member States to have their hands free to adopt and implement a restrictive immigration policy. This reason contrasts to the official explanation that intergovernmental cooperation is required to preserve national sovereignties. It could be said that instead of bringing the previous ad hoc intergovernmental cooperation into line with Community Law, it was more the previous rules that were changed to protect the basic decision-making process of that cooperation. Moreover, the changes introduced by the Treaty on European Union to the Treaty of Rome do not seem to compensate in a positive sense for the negative elements of Title VI.

Under Article 100C of the EC Treaty, the Community is granted explicit competences only in two aspects of visa policy. These are indeed only a small part of issues concerning border controls, not to mention immigration from third countries and third country nationals in general. The Agreement on Social Policy allows all Member States, except the United Kingdom, to adopt by unanimity Directives on conditions of employment of legally resident third country nationals. However, more than two years after its entry into force, this provision has never been used. Last, but not least, the

[218] This procedure was adopted for the new Article 118A(2), on improvements on the health and safety of workers.

creation of European Citizenship for nationals of Member States only, reinforces the social exclusion of third country nationals resident in the Community. This has a practical and symbolical importance.

As a kind of summary, I will recall here the assessment made by Weiler:

> "Like the rejection of the much misunderstood term "federalism", the Three Pillar structure was in part of symbolic importance, a statement of *méfiance* against the Community and its institutions. Mistrust, fear and a certain measure of bad faith must have played at least some part in this choice. The mistrust was in the ability of the Community institutions and Community procedures to respond effectively to the new exigencies. The fear was, one surmises, of losing national control over delicate policy issues - a fear that, in fact, Community institutions could respond too effectively in vindicating the Community, rather than the Member States, interests. The bad faith was, perhaps, in assuming legal obligations but trying to exclude judicial control over their implementation and enforcement."[219]

Nevertheless, some positive points may also be found in the Treaty of European Union. In Title VI, the right of intervention of the Commission and the European Parliament, although limited, is now legally asserted. Compared to the previous ad hoc cooperation, information on Title VI activities is more easy to obtain. The fact that the competent organs will be the same as those of the Community, due to the single institutional framework of the Union,[220] also marks some progress. The jurisdiction of the Court of Justice on cooperation activities is now discussed by Member States governments and accepted in some cases.[221] Therefore, some aspects of the Treaty on European Union may be welcomed. They are steps in the right direction.

As O'Keeffe puts it,

> "One conclusion to be drawn from the Union Treaty provisions (...) is that one may be assisting at the start of a very slow evolutionary process, whereby there may be a very gradual transfer of competence to Community institutions".[222]

"Slow evolution" are two good words for a summarised assessment of the new rules introduced by the Treaty on European Union. We can take either an optimistic or

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[219] Weiler, "Neither Unity nor Three Pillars - The Trinity Structure of the European Union", op.cit., at 50.

[220] See Article C, first subparagraph. As Müller-Graff puts it "In practice this is probably the most important new step taken in establishing the third pillar", Müller-Graff, *CMLRev*, op.cit., at 496. Note, however, that the validity of this idea has been criticised. Wellenstein states that the institutional set-up of the Union is "more singular than single". See Wellenstein, "Unity, Community, Union - what's in a name?", Guest editorial, *CMLRev*, Vol.29, 1992, No.2, pp.205-212, at 209.

[221] Note that although the United Kingdom government did not accept the jurisdiction of the Court of Justice on the Europol Convention it did accept it as far as some other Conventions are concerned. See Article 27 of Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes, concluded on 26 July 1995, OJ C 316/34, of 27/11/1995; and Article 8 of the Convention drawn up on the basis of Article K.3 of the Treaty on the protection of the European Communities' financial interests, concluded also on 26 July 1995, OJ C 316/49, of 27/11/1995. All the other Member States accepted the jurisdiction of the Court of Justice in the three Conventions mentioned supra.

[222] See O'Keeffe, D., "The Schengen Convention: A Suitable Model for European Integration?", *YEL*, 1991, pp.185-219, at p.216.

pessimistic perspective on those rules, depending on which of them we attach more importance to.

My overall judgment must be one of regret at the loss of a major opportunity to make more substantial progress in this important area.

Chapter 8

IMMIGRATION POLICY

(CONTROL OF EXTERNAL BORDERS ADMISSION OF IMMIGRANTS ACTION AGAINST ILLEGAL IMMIGRATION)

INTRODUCTION

The aim of this chapter is to analyse the activities of the European Union in the field of immigration policy *strictu sensu*: control of persons at the Union external borders, action against illegal immigration (including expulsion of illegal immigrants) and admission of immigrants to a Member State.[1]

The present chapter will analyse some legal aspects of the current Union activities on the fields mentioned. Previous work, that developed by the early intergovernmental cooperation (before the entry into force of the Maastricht Treaty) is not the main concern of this chapter. Despite this, such work has relevance to this chapter, as the present Union activities are mainly a continuation of that work. Therefore, the work of the old intergovernmental cooperation will be mentioned when necessary to put in context the present activities and discussions within the European Union institutions.

As the focus of this chapter is the analysis of the legal instruments being discussed within the Union institutions, a substantial part of it will be dedicated to the control of external borders, where legal instruments were proposed by the Commission. Generally speaking, measures on expulsion and admission of immigrants from third countries remain in a less advanced stage, or are not meant to have a legally binding nature. Therefore, their analysis will be more general.

Section A of this chapter will deal with controls at the external frontiers. First, the Commission's draft Convention on the Crossing of the External Borders will be examined. The historical antecedents of this draft will be recalled. Then, a general overview of the Convention rules will be made and some interesting issues arising from its rules will be addressed. Secondly, this section will examine the rules on visas proposed by the Commission. This examination will comprise both the rules on visas of the draft External Frontiers Convention and some aspects of the Commission's draft Regulation concerning the list of countries whose nationals are required to have a visa to enter the Union.

Section B will analyse the resolutions adopted on the admission of third country nationals to Member States. It will examine the resolutions on admission of employed persons, self-employed persons, students and admission for family reunification.

Section C will make an overview of the Union's activities in the fight against illegal immigration, including the expulsion of immigrants from third countries. This section will deal both with measures to be taken within the Community and measures to be adopted in the framework of relations with third countries.

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[1] There is a considerable number of works on the treatment of immigration related matters at an European level, namely by the Member States of the European Union. However, only some of those works concentrate on the concrete activities developed in the framework of the intergovernmental cooperation between all Member States, notably within the institutions of the European Union. Among the latter works see Nanz, Klaus-Peter "The Harmonization of Asylum and Immigration Legislation Within the Third Pillar of the Union Treaty - Stocktaking", in *The Third Pillar of the European Union - cooperation in the fields of justice and home affairs*, Monar, J. & Morgan, R. (eds.), European Interuniversity Press, Brussels, 1994, pp.123-133; Niessen, J. "European Migration Policies for the nineties after the Maastricht summit", CCME Briefing Paper No.7, Brussels, CCME, February 1992; O'Keeffe, David, "The Emergence of a European Immigration Policy", *ELRev.*, Vol.20, 1995, No.1, pp.20-36; Webber, Frances "European Conventions on Immigration and Asylum" in *Statewatching the New Europe - a Handbook on the European State*, Bunyan, T. (ed.), London, Statewatch, 1993, pp.142-153.

A -CONTROL OF EXTERNAL BORDERS

1- THE COMMISSION'S DRAFT CONVENTION ON THE CROSSING OF THE EXTERNAL FRONTIERS OF THE MEMBER STATES [2]

a) General presentation

Origins of the present draft

A Convention establishing uniform and reinforced controls at the external borders has been considered an essential legal part of and a practical prerequisite for the abolition of internal border controls and thus for a true freedom of movement of persons in the Community.[3]

The *ad hoc* immigration group had already prepared a draft Convention on the crossing of external borders.[4] This draft was ready by 24 June 1991, but progress on its approval has been obstructed since 1 July 1991. The Convention was not signed then due to the disagreement between Spain and the United Kingdom on its application to Gibraltar.[5] Successive appeals made by the European Council to Spain and the United Kingdom to reach a compromise were fruitless.[6]

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[2] See the Beazley report of 19 April 1994, on the communication of the Commission containing a proposal for a decision, based on Article K3 of the Treaty on European Union establishing a Convention on the crossing of the external frontiers of the Member States, made on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, doc.ref. A3-190/94/corr.; and the Beazley report of 23 September 1993, on the crossing of the EC external borders, made on behalf of the same Committee, doc.ref. A3-0253/93 (the former Beazley report /94 was adopted in 21/4/1994 by the Legislative resolution embodying the opinion of the European Parliament on the draft Convention of the Commission, OJ C 128/358 of 9/5/94; whilst the latter Beazley report was approved on 28/10/1993 by the EP resolution on the crossing of the EC external borders, OJ C 315/244 of 22/11/93); O'Keeffe, David "The New Draft External Frontiers Convention and the Draft Visa Regulation", *The Third Pillar of the European Union...*, op.cit., at pp.135-149, and "The Convention on Crossing the external frontiers of the Member States", in *From Schengen to Maastricht*, Alexis, P. (ed.), Maastricht, EIPA, 1995; and, by the Select Committee on the European Communities of the House of Lords, the report on "Visas and controls of the external borders of the Member States", 14th Report, Session 1993-94, HL 78, London, HMSO, 1994.

[3] This has been repeatedly considered to be so by the Community and Union organs, including the European Council. Such was the case of the latter's meeting in Edinburgh in December 1992, see Bull.EC, 12/1992, p.11, point 1.10. See also, for instance, the Palma Document and the Press Release, PRES/91/120 (1.7.91) of the General Secretariat of the Council on the Meeting of Ministers concerned with Immigration, in Luxembourg. On the part of the Commission see point 55 of the White Paper on "Completing the Internal Market", COM (85) 310 and the declarations of Commissioner Flynn that the draft Convention "contains essential compensatory measures for the elimination of checks on individuals at the internal borders", Commission's Press Release on the "Implementation of Maastricht's Third Pillar", IP/93/1065 (30.11.1993).

[4] Its official name was Draft Convention of the Member States of the European Communities on the crossing of external frontiers.

[5] See Press Release, PRES/91/120 (1.7.91) of the General Secretariat of the Council on the Meeting of Ministers concerned with Immigration, in Luxembourg. For a review of the main legal problems that have arisen by the particular status of Gibraltar, both from an historical point of view and more recently see

In December 1993, the Commission presented to the Council and the European Parliament a Draft Convention on the crossing of the external frontiers of the Member States.[7] This proposal followed Article K.1 of the Treaty on European Union, which provides that Member States should regard as matters of common interest, inter alia, the "rules on the crossing by persons of the external borders of the Member States and the exercise of controls thereon". The Commission's proposal may be approved under Article K.3(2) of the Treaty on European Union.

The present draft does not seek to solve the disagreement between Spain and the United Kingdom, as the Commission admits that bilateral negotiations between the two countries will still be necessary.[8] In all other aspects the substantial consensus attained in July 1991 is supposed to hold in future.[9]

The Commission's present draft Convention brought this area into the framework of the European Union. Still, the Commission's draft is very much based on the external borders Convention drafted by the *ad hoc* immigration group. The latter, in turn, is very similar to the corresponding provisions of the Schengen Implementing Agreement.[10] Therefore, in some aspects, the Commission's draft Convention may be the object of similar criticisms as the previous draft and the Schengen Implementing Agreement.

Nevertheless, the present draft of the Commission, although based on the old draft of the *ad hoc* immigration group, contains some adaptations to the new legal framework introduced by the Treaty on European Union and the EEA Agreement.[11] The adaptations,

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Lincoln, S.J., "The Legal Status of the Gibraltar: Whose Rock Is It Anyway ?" *Fordham International Law Journal*, Vol.18, November 1994, No.1, pp.285-331. See also "España sancionará a Gibraltar y el Reino Unido por no ayudar en la lucha contra el contrabando", *El País*, 15/3/1995, p.25; and *Gibraltar and the EC: Aspects of the Relationship*, RIIA Discussion Paper No.49, London, Royal Institute of International Affairs, 1993. This paper includes an appraisal of the economic situation of Gibraltar and its relevance for the EC-Gibraltar relations.

[6] The problem of Gibraltar is not a simple one. The sensitive sovereignty aspect of the problem is well known. But there are also other aspect of it. Spain accuses Gibraltar of facilitating the smuggling of tobacco and other goods to the rest of the Iberian Peninsula, an accusation that is likely to have some truth in it. Several Spanish proposals for some form of joint control of Gibraltar borders (namely in the Gibraltar airport) by Spanish and UK-Gibraltar authorities. They were all were turned down by the latter authorities. There is also a broad consensus that the United Kingdom government uses the Gibraltar problem to avoid progress in the building up of conditions to facilitate the total abolition of internal border controls in the Union. On the other hand, Gibraltar accuses Spain of using security related excuses to impose harsh frontier controls that undermine seriously the economy of the territory, which is heavily dependent on tourism and commercial activities.

[7] COM (93) 684 of 10/12/1993. This communication also contains a Proposal for a regulation (based on Article 100C of the EC Treaty) determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.

[8] COM (93) 684, p.1a.

[9] See, e.g., the Press Release, of the Meeting of Ministers responsible with Immigration, PRES/93/90 (2.6.93), p.4.

[10] As O'Keeffe refers, it was "largely modelled on the Schengen framework: like Schengen, it relies on an advanced information system and enhanced police and judicial cooperation in order to carry out the aim of increased and more effective external border controls", see O'Keeffe, David in "The Emergence of a European Immigration Policy", op.cit., at p.24.

[11] COM (93) 684, p.4 of the Explanatory Memorandum. Here the Commission adds a further development "in the Community framework": the fact that "controls [on goods] have effectively been removed since 1 January 1993.

according to the Commission, were necessary namely in relation to the new Article 100C of the EC Treaty. This provision gave the European Community competence in certain aspects of visa policy (uniform format and list of countries whose nationals are required to have visas) previously covered by some Articles of the draft Convention of the *ad hoc* immigration group.[12]

Overview of the Content of the Draft Convention

The Draft Convention begins by defining, in its first Article and Title, the concepts used in its main text. Then, Title II establishes general principles on the crossing of the external frontiers, surveillance and the nature of the controls to be made therein, with specific arrangements being laid down for controls in airports.

Title III first rules on the conditions of entry for short stay of third country nationals who are not protected by Community Law, in the sense that they do not have a right of entry and residence in a Member State. Secondly, the crossing of external frontiers is specifically regulated in relation to third country nationals who are residents in a Member State. Finally, a brief reference is made to the entry for stay other than for short periods of time.

Title IV deals with some aspects of the enforcement of the refusal of entry, particularly through compiling a list of persons to be refused entry. It rules on the general criteria for inclusion in that list and the consequences of being included in it for the purpose of the issue of residence permits and entry in exceptional circumstances. It also establishes the main principles on the exchange of information on data contained in the joint list.

Title V deals with accompanying measures, such as the reinforcement of responsibilities of carriers, the consequences of illegal crossing of external frontiers and the compensation for financial imbalances between Member States due to expulsions. Title VI sets up a number of rules on visas.

Title VII deals with the implementation of the Convention, in relation to the voting procedure for the adoption of the implementing measures of the Convention, the primacy of international instruments of human rights, and Member States' relations with third States on frontier controls. Last, but not least, it provides for jurisdiction to the Court of Justice on matters related to the interpretation and settlement of disputes related to the Convention.

Title VIII of the draft Convention contains a single Article, meant to refer to the territorial scope of the Convention. Its text is presently blank, awaiting the results of the negotiations on the status of Gibraltar.

b) Issues on the Substantive Rules (Titles I to V)

The present part of this chapter will examine some issues related to the rules of Titles I to V. The analysis made in this section will not provide an exhaustive examination of those Titles. Instead, it will endeavour to make a general overview of the substantive

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[12] Note also that an opinion of 11 February 1993 of the legal service of the General Secretariat of the Council agreed with the need to amend, in that respect, the previous draft of the Convention. See *Mise en oeuvre du traité de Maastricht...*, op.cit., p.217.

rules of the Convention (except on visas) and address some interesting points raised by these rules.

Title VII will be analysed subsequently and Title VI, on visas, will be examined later, together with the Commission's draft Regulation on visas.

(i) Personal scope: rule and exceptions

The personal scope of the provisions of the Convention is defined by Article 1(2) as being "all persons other than those entitled under Community Law", "except where there is an express statement to the contrary". According to Article 1(1) "persons entitled under Community Law" include both nationals of a Member State and nationals of third countries who, under Community Law, are entitled to enter and reside in a Member State. The reference to EC Law includes both the external agreements of the EC (particularly the EEA Agreement)[13] and the internal EC instruments conferring such a right on relatives of a migrant national of a Member State.

There seems to be a slight over assumption of the Convention, in its Article 1(1), in presuming that all nationals of an EC Member State are entitled to enter any other Member State.[14] It is true that they have the right of entry, at least if they can justify it with the recipience of services in that Member State.[15] However, in certain situations that may not happen. The Convention introduces no new rule in this respect. However, clearly, its concern is not the control of the entry of nationals of Member States[16] but the control of third country nationals not "entitled under Community Law".

In any case, the general definition of the personal scope of the Convention has a number of exceptions. All persons are obliged to cross the external frontiers of the Member States at authorised crossing points[17] and are liable to penalties for violating such an obligation.[18] All persons shall be subject to an identity control at the crossing of an external frontier.[19] Another exception is that third country nationals, entitled under Community Law to enter and reside in a Member State, may be required an entry visa if an EC instrument adopted under Article 100C so stipulates.[20] Finally, Article 6, on specific

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13 See in this respect Chapter 5, on the external agreements of the European Community.

14 For practical reasons I referred only to entry, although Article 1(1) when defining the persons who are "entitled under Community Law" refers also to third country nationals who "have a right of entry and residence in a Member State" - emphasis added.

15 See Cases 286/82 & 26/83 Luisi and Carbone [1984] ECR 377. They can also be beneficiaries of the right of entry under other situations protected by Community Law, like those regulated under the Directives analysed in chapter 4.

16 In this respect note that routine and systematic questioning of those entering the territory, concerning the purpose and duration of their journeys and their financial means, were held contrary to Community Law in case C-68/89, Commission v. Netherlands, [1991] ECR I-2637, particularly paragraph 10. However, the EC Court of Justice cleared spot checks in the case 321/87, Commission v. Belgium [1989] ECR 997.

17 Article 2(1).

18 This is so "unless otherwise stipulated in the law of the Member State concerned", according to Article 2(4) in fine. The precise personal scope of the obligation referred to and liability may be also modified by eventual specific rules related to the "particular categories of maritime traffic" and "arrangements for local frontier traffic", established by implementing measures to the Convention, in accordance with its Article 2(5).

19 Article 5(1).

20 Article 5(2).

arrangements for controls at airports appears to apply also to all persons, as will be submitted below.

(ii) Controls at the external frontiers (Title II)

Article 4 establishes the general principle that the "crossing of external borders shall be subject to control by the competent authorities of the Member State concerned (...) in accordance with national law". However, the controls envisaged by the Convention are to be performed "with due regard" for the provisions of the latter[21] and taking into "account the interests of the other Member States".[22]

Article 3 provides that external frontiers :

> "(...) shall be kept under effective surveillance by mobile units or by other appropriate means. Member States undertake to provide surveillance yielding similarly effective results along all their external frontiers; their surveillance agencies shall consult and cooperate to that end".

This provision is perhaps an attempt to give a legal answer to the political claim of the governments of some Member States, notably the United Kingdom, that the southern EC States cannot be trusted to control their frontiers in an effective manner.[23]

Article 2 establishes that all persons are obliged to cross the external frontiers "at authorised crossing points permanently controlled by the Member States",[24] otherwise they "shall be liable to penalties as determined by each Member State",[25] the latter also being responsible for determining "the location and opening conditions of authorised crossing points on its external frontiers".[26] Exceptions to these rules may be "stipulated in the law of the Member State concerned"[27] or, in that which regards maritime and local frontier traffic, by measures giving effect to the Convention.[28]

- Nature of controls to be made

Controls are envisaged in relation to persons and objects - the travellers baggage and vehicles.

In relation to persons, the basic principle is established in Article 5 :

> "When crossing an external frontier upon entering or leaving the territories of the Member States, all persons shall be subject to visual control under conditions which permit their identity to be established by examination of their travel documents."

Upon the persons' entry, their control shall ensure that they fulfil the conditions of entry set out in Article 7.

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[21] Article 4.
[22] Article 5(6).
[23] On this point see O'Keeffe, D., "Non-Accession to the Schengen Convention: The cases of the United Kingdom and Ireland" in *Schengen en Panne*, Pauly, Alexis (ed.) Maastricht, EIPA, 1994, p.145 at 151.
[24] Article 2(1).
[25] Article 2(2).
[26] Article 2(3).
[27] Article 2(4).
[28] Article 2(5).

It is envisaged that controls may exceptionally be relaxed in accordance with the implementing measures of the Convention,[29] which shall determine detailed rules for applying the controls in general.[30]

An important principle is established by Article 5(4) when providing that:

"controls upon entry shall take precedence over controls upon departure."

In relation to the travellers' baggage and vehicles, Article 5(5) provides that they may be controlled, without prejudice to relevant Community rules, where such control is necessary for: "detecting and preventing threats to national security and public policy; or combating illegal immigration".

- Controls at airports

Article 6 provides, in a quite detailed manner, for specific arrangements for controls at airports. Its detailed rules have probably the aim of ensuring a very effective control of air passengers entering or departing from an EC Member State.

Article 6 appears to apply to all persons that cross the external borders. First, it makes no distinction among the persons to whom it applies to: it refers only to "passengers". Secondly, it seems that, from a substantial point of view, Article 6 is a specific application of the general rules of Article 5 (on the nature of controls at external frontiers) which applies to all persons. Finally, it does not seem possible to achieve its underlying objectives if it applies only to a certain group of persons, namely "persons not entitled under Community Law".[31] One of the objectives of the Article is to ensure an effective control of immigration to the Union and this justifies the need to control all persons. Another objective is to control the passengers' luggage. It would be difficult to ensure a complete control of luggage if only persons entitled under Community Law had their luggage checked by the police. Two passengers, one entitled and the other not "entitled under Community Law", could meet and intentionally exchange luggage to avoid security or customs controls.

(iii) Conditions of entry (Title III)

- for persons not entitled under EC Law, in general

Article 7 spells out the conditions of entry for a short stay[32] of third country nationals who under Community Law do not have a right of entry and residence in a

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[29] Article 5(4). The EP Beazley report of 19 April 1994 suggested the elimination of the exceptional character of this relaxing of controls.

[30] Article 5(3).

[31] A number of other provisions seem to clearly apply only to persons "not entitled under Community Law". Among these provisions are Article 10, on the list of persons to be refused entry, Articles 11 and 12, on issue of residence permit and refusal of entry to a Member State, respectively, and Article 15, on illegal crossing of external frontiers. Their objective seems to make sense only in relation to persons who do not have a Community right of entry to the EC. Besides, there is always the principle established in Article 1(2), according to which the "Convention applies, except where there is an express statement to the contrary, to all persons other than those entitled under Community Law". Also Article 14 (on national measures to be taken on responsibilities of carriers) when referring to "persons coming from third countries" or to "a person coming from a third country who is refused admission", seems, by definition, to exclude its application to persons entitled under Community Law.

[32] Article 1(g) defines short stay for the purposes of the Convention: it is to be considered as "(...)an uninterrupted stay or successive stays in the territory of the Member States the length of which does not exceed three months, calculated over six months from the date of first entry".

Member State. According to Article 12, a person that does not fulfil one or more conditions of Article 7(1) shall be refused entry to the territory of the Member States.

The conditions for such an entry are the following: the possession of "a valid travel document which authorises the crossing of frontiers"; the "possession of a valid visa for the length of stay envisaged"(if applicable); the presentation of "documents justifying the purpose and conditions of the intended stay or transit" ("in particular the required work permits if there is reason to believe that [the person] intends to work") and, finally, the possession or possibility to acquire lawfully "sufficient means of subsistence" for the stay or transit, and for the return to the "country of origin or travel to a third State" into which the person is certain of being admitted.

It will be interesting to see how these last criteria will be applied, especially as there is no reference to their eventual detailed definition by measures implementing this Convention. This is a topic of the most practical importance, as its application will define who the immigration authorities will accept as a tourist or will consider to be, e.g., a prospective immigrant. Therefore, this is clearly a matter that needs more developed rules. Otherwise, there is the risk of leaving genuine tourists from third countries with no practical legal means of proving their situation.[33]

A further entry condition required by Article 7(1)(c) is that the person "does not represent a threat to the public policy, national security or international relations of Member States" and "in particular" that the name of that person "does not appear in the joint list" of persons to be refused entry. This list will be examined later.

Article 7(2)(a) establishes that a person may be also be refused entry if his or her name is in "the national list of persons who are not to be admitted to the Member State to which he seeks entry". This provision refers to eventual differences in the Member States lists of persons to be refused entry. It has a very important practical and symbolic effect: it acknowledges the absolute supremacy of the national sovereignties in this field.[34] Irrespective of the rules set out in other provisions of the Convention, if a Member State wants to bar the entry of a "person not entitled under Community Law" it simply has to put the name of that person on its national list. It appears that the Court of Justice, even if given jurisdiction over the Convention as the latter envisages, could do nothing at all to alter this state of affairs.

Finally, according to Article 7(2)(b):

> "Any person may also be refused entry: (...) in all the circumstances in which a national of a Member State may be refused entry to another Member State."

This seems to refer primarily to the Community instruments on restrictions to free movement of persons due to reasons of public policy, public security or public health.[35]

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[33] A selective, restrictive interpretation of this rule - particularly demanding in relation to nationals of some countries, for instance - may also be equivalent in practice to a disrespect of an eventual positive list of visa countries eventually adopted under Article 100C. See chapter 7 for an analysis on the EC competence on visas under Article 100C.

[34] The Convention does not contain one single reference to any eventual measure implementing this rule that would require this assessment to be mitigated.

[35] The most important of which is Council Directive 64/221/EEC, of 25/2/1964, on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 56/850 of 4/4/64. See also Council Directive 72/194/EEC of 18/5/1972 (OJ L 121/32 of 26/5/72) and Directive 75/35/EEC of 17/12/1974 (OJ L 14/14

However, in this way only the reference to public health would be added to the one already made by Article 7(1)(c) to public policy and national security.

Nevertheless, under Community Law there are other reasons to justify the refusal of entry to nationals of Member States. Such reasons constitute the reverse side of the justifications for entry under Community Law. Nationals of a Member State (and some of their relatives) may enter another Member State if they go there to work (as employed, self-employed persons or providers of services), to receive services, to study, or to reside as retired persons or otherwise.[36] If a national of a Member State may at least justify his or her entry to another Member State to receive services, she or he will be allowed to enter into that State.

One may wonder if the rule established by the second part of Article 7(2) could be interpreted as adding a similar requirement for the entry of third country nationals to a Member State. Such a requirement would only make a difference if it added some substantial content to the condition referred in Article 7(1)(d): the possession of or possibility to acquire lawfully "sufficient means of subsistence" for the intended stay or transit. If the latter condition may already be questioned (notably in relation to its precise content), the situation could worsen by demanding proof of the intention to receive services. It would, for instance, be more difficult for third country nationals to come to a Member State to visit relatives residing there. One hopes that measures implementing the Convention will dispel these concerns.[37]

- for third country nationals residing in a Member State[38]

Under Article 8, third country nationals resident in one Member State can enter another Member State without being required to have an entry visa.[39] This rule is

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of 20/1/1975); extending the scope of Directive 64/221/EEC to persons exercising the right to remain in the territory of a Member State, after having been there workers or self-employed persons (respectively).

[36] In the three latter cases the right to reside depends on proof that the interested persons do have "sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence" and to "be covered by sickness insurance in respect of all risks in the host Member State". Articles 1 of Council Directive 93/96/EEC of 29/10/1993 on the right of residence for students, OJ L 317/59 of 18/12/1993, Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity and Council Directive 90/364/EEC on the right of residence for persons who do not enjoy this right under other provisions of Community Law, OJ L 180 13/7/90, pp.28 and 26, respectively.

[37] In the end it may even happen that each Member State defines the precise threshold for the immigration authorities to recognise the existence of "sufficient means of subsistence". This may be questionable from the point of view of uniformity of rules, especially taking into account that third country nationals coming into the Union may enter, for instance, through a more expensive country to go to less expensive countries. However questionable, this was exactly what was proposed by a draft "Text on a project of common action of the European Union on immigration" made by the VI course of the Italian *Scuola di scienza e tecnica della legislazione*. See Rassegna Parlamentare, Year XXXVI, April-September 1994, No.2-3, pp.135-8, and 303-8.

[38] Cf. with the Draft Directive proposed in COM (95) 346 final, which grants, under certain conditions, to third country nationals "who are lawfully in a Member State", the right to travel in the territories of other Member States. This draft Directive is analysed in chapter 4 and has many points in common with the corresponding provisions of the draft External Frontiers Convention.

[39] A literal interpretation of the wording of Article 8 ("a Member State shall not require a visa of a person who wishes to enter its territory... ") will be sufficient to conclude that its rule applies both to external

conditioned by the following requirements. First, the third country national can only enter that Member State for a short stay or to travel (transit) through it. Secondly, he or she has to fulfil the general conditions for entry established in Article 7(1); except the visa requirement itself. Thirdly, he or she has to hold a residence permit entitling him or her to reside in another Member State, which is valid for more four months after the time of entry. In "exceptional cases", it will be enough to have "a provisional residence permit issued by a Member State and a travel document issued by that Member State."[40]

Article 8(5) envisages that measures implementing the Convention shall draw up: a list of the residence permits and provisional residence permits to be accepted as equivalent to visas and an "indicative list" of the exceptional circumstances in which Member States' authorities shall also accept provisional residence permits and travel documents issued to third country nationals by a Member State as being equivalent to visas. In relation to such an "indicative list", apparently, in the implementing measures of the Convention the word indicative should be applied in the sense that other documents of the type referred to may be accepted. In fact, while Article 8(2) only refers to "exceptional cases" in which the entry without visa "may also apply" to holders of those documents, Article 8(5) establishes that Member States "shall" accept them as equivalent to visas.

It should be noted that the Commission's draft Convention does not require that third country nationals residing in the Union to register in another Member States within three days of their arrival there. The *ad hoc* immigration group's version of the Convention made such a requirement.[41]

Article 8(4) of the Commission's draft provides that "in exceptional cases", "for urgent reasons of national security", a Member State may require a visa for the entry of a third country national residing in the Union. This requirement must take into consideration the interest of the other Member States"[42] and "shall be used only to the extent that and for as long as is strictly necessary to achieve the purposes referred".[43] There is an interesting aspect in this rule: it seems to be a *lex specialis* of Article 7(1)(c), which stipulates that the entry of a person[44] is conditioned to the fact that he or she "does not represent a threat to public policy, national security or international relations of the Member State".[45]

Article 8 in general is also a *lex specialis* of Article 7. While the latter establishes the conditions of entry for a short stay of persons "not entitled under Community Law", Article 8 regulates one of those conditions (the visa requirement) in relation to third

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frontiers controls and to controls within the Union territory - whether they are made at internal borders or inside the territory of the Member States.

[40] Article 8 (2).

[41] Webber, F., "European Conventions ...", op.cit. at p.150.

[42] Article 8(4)(1).

[43] Article 8(4)(3). Besides, according to Article 8(4)(2) "The Member State concerned shall inform the other Member States in an appropriate manner, determined by measures to give effect to this Convention."

[44] Again, to be more precise : of a person "not entitled under Community Law".

[45] See also the obvious relation between Article 7(1)(d) in fine and the main text of Article 10(3). However, Article 7(1)(c) refers to threat to the public policy, national security and international relations of a Member State, while Article 10(3) refers only to a threat to the public policy or national security of a Member State.

country nationals residing in a Member State. The follow-up of this reasoning may be interesting in relation to the exceptional clauses of Article 7(1)(c) and Article 8(4). It seems that a Member State - invoking "urgent reasons of national security" as in Article 8(4) - may require a visa for the entry to its own territory of a third country national residing in the Union, while it may decide not to refuse his entry by resorting to the exceptional clauses of Article 7(1)(c). This may seem odd at first sight, but it can also be a flexible instrument of control of what Member State's see as their national interests, without, at the same time, entailing an absolute bar on the entry of a person. In specific circumstances, it is perfectly justifiable that the authorities of a Member State need to know if one person or a group of persons enters their territory, while it may not be necessary to bar them from entering.[46]

As we have seen, the draft Convention does not give to third country nationals resident in another Member State an automatic right of entry to the territory of another Member State. They have to fulfil all the entry conditions of Article 7, including those of Article 7 (1) (c) - on the threat to the public policy, national security or international relations of a Member State - and Article 7(1)(e) - on the possession of sufficient means of subsistence for the stay and return. Therefore, it must be emphasised that the only requirement that they are in principle free is obtaining a visa.

It may be questioned whether the rules conditioning the entry of third country nationals, who are resident in a Member State, into another Member State, are in conformity with Article 7A of the EC Treaty. In a way, those conditions of entry may be less important to the extent that internal border controls are abolished. Yet, even if controls at the frontiers are abolished, the problem remains in relation to personal controls inside the territory of the Member States. In relation to the latter controls it could, perhaps, be argued that the need may arise for additional rules to guarantee that border controls are really abolished and not only moved from the borders to the interior of the territory of the Member States.

Meanwhile, the practical importance of Article 8 of the draft Convention has to be assessed not only in view of its inherent limitations (its conditions and exceptional derogatory clauses), but also in relation to the current legislation and practice of visa requirements in a Member State for third country nationals living in another Member State. In this respect it would be important to consider how many third country nationals residing in a Member State would be required a visa to enter other (and which other) Member States.

In any case, although the utility of Article 8 may be in the end more limited than it may seem at first sight, it is, in any case, a good example illustrating that the Convention rules are not only repressive. It has a clear positive effect for third country nationals.[47] As O'Keeffe recalls, this rule

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[46] However, it should be noted that all the restrictions to the movements within the Union of residents in the latter have to be put into context by reference to the precise legal and practical situation regarding internal border controls and controls on persons within the territory of each Member State.

[47] On this aspect see also Article 18 of the draft Convention and the Convention rules on visas. On the other hand, one can only hope that Member States will obey this rule better than they have done in

"(...)is particularly important in the case of long term residents or a fortiori second or third generation migrants who otherwise may have to face long bureaucratic delays and possibly humiliating interrogations and obstacles before being entitled to move for a short period through the territory of the Union, even though they have lived a large part or indeed all their life in the Union."[48]

Finally, it should be noted that the facilitation of movement within the Union of third country nationals resident therein has been recently on the working agenda of the Union institutions. The German Presidency planned to propose "that Member States waive visa requirements for such persons for purposes of transit or short stays." This proposal was meant to be implemented before the entry into force of the External Frontiers Convention.[49] A similar measure was meanwhile approved in relation to students residing in one Member State, who go into another Member State in the framework of a school visit.[50] More recently, in July 1995, the Commission proposed three Directives to abolish completely internal border controls on persons,[51] one of which deals specifically with the right of third country nationals to travel among Member States.[52] These three Directives were analysed supra, in chapter 4, section A.

- entry for stay other than for a short time

Article 7 and 8 of the draft Convention concentrate on the regulation of the entry in a Member State for a short stay. Article 9 establishes that when the entry to a Member State has another purpose other than for a short time, it shall be done "under the conditions laid down in its national law." It adds that in such a case "access shall be restricted to the territory of that State."[53] Naturally, if a person acquires a residence

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relation to Community provisions (Article 3(2) of Directive 68/360, Articles 2(2) of Directives 90/364, 90/365 and 93/96 and Article 2(2) of Directive 73/148, all quoted and analysed in chapter 4. These provisions oblige Member States to provide to third country nationals, who are relatives of a migrant national of a Member State, "every facility for obtaining any necessary visas". On a number of occasions, the European Commission has initiated the proceedings established by Article 169 of the EC Treaty against certain Member States that did not respect this rule. See above, chapter 4, and the 7th Annual Report on the Control of the Implementation of Community Law-1989, COM (90) 288 final, 1989, published in OJ C 232/1 at p.19, of 17/9/90.

[48] See O'Keeffe, "The New Draft...", op.cit., at p.148.

[49] See "Objectives and major Topics in the field of Home Affairs in the EU in the Second Half of 1994", by the German Federal Ministry of the Interior, doc.ref. PE 209.051, p.5.

[50] See the Decision 94/795/JHA on a joint action concerning travel facilities for school pupils from third countries resident in a Member State, adopted by the Council on 30 November 1994, OJ L 327/1-3. See, also the Background document for the Justice and Home Affairs Council of 30 November and 1 December 1994, Press Service of the General Secretariat of the Council, doc.ref. CM94-128/6, p.2.

[51] COM (95) 346, 347 and 348 final, of 12/7/1995.

[52] Draft Council Directive on the right of third-country nationals to travel in the Community, COM (95) 346, final, of 12/7/1995. Note also that one of these three Directives proposes the deletion of the rules of EC secondary legislation allowing Member States to request visas (or other formalities) for the entry of third country nationals to their territories. See draft Directive presented in COM (95) 348 final, of 12/7/1995.

[53] The Beazley report of 19/4/1994 proposed that only until 31 December 1995 Article 9 applied to stays other than for a short time, in which case access would be limited to the authorising Member State. After that date, the possibility of Article 9 of entering a Member State under the conditions of its national law

permit later on, he or she can then benefit from the right to enter another Member State for a short stay - provided the entry conditions of Article 7 are fulfilled.

- readmission obligation

The benefit enjoyed by third country nationals residing in the Union, that of not being required to have a visa to enter another Member State, has a reverse side in the Member States where they reside. According to Article 8(3):

> "Member States shall, under conditions determined by measures to give effect to this Convention, take back any person to whom they have issued a residence Permit or provisional residence permit (...) and who is illegally resident in the territory of another Member State."

Note that, in contrast, the Annex of the draft Directive presented in COM (95) 346, referred to above, contains detailed provisions on the readmission by a Member State of third country nationals who are unlawfully resident in another Member State, but who hold a residence permit issued by the former Member State. See chapter 4, section A for some details on those rules.

(iv) Enforcement of entry conditions (Title IV)

- Joint list of persons to be refused entry in the Member States territory

One of the fundamental instruments of control envisaged by the Convention is the joint list of persons "to whom the Member States shall refuse entry to their territories".[54] This joint list is to be drawn up on the basis of notifications of names made by each Member State and "shall be continually updated".[55]

As can be easily imagined, and as suggested by references contained in some rules of the Convention,[56] there will be a joint list and a national list. In principle the joint list should include all the names on the national lists.[57]

Paragraph 3 of Article 10 establishes the rules to govern the decision to put the name of a person on the Joint List. The basic principle is that "the decision to put a person on the joint list shall be based on the threat which that person may represent to the public policy or national security of a Member State. It is generally envisaged that the inclusion of a person on the Joint List "shall be based on a decision taken with due regard for the rules of procedure laid down by national law by the administrative or judicial authorities of the Member States." Such a decision shall be taken on account of one of the following alternative situations: a custodial sentence of one year or more in that Member State; "information to the effect that the person concerned has committed a serious crime"; "serious ground for believing that [the person] is planning to commit a serious crime or that he represents a threat to the public policy or national security of a Member State", or,

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would apply to persons proposing to stay other than for a "limited period". This limited period is probably identical to the "stay of limited duration" defined in the new Article 1(g) - proposed in the same report - as being "an uninterrupted stay or successive stays the length of which does not generally exceed one year".

[54] Article 10(1).

[55] Article 10(2). The submission of such names is to be done in accordance with measures implementing the Convention, as established by Article 10(1).

[56] Notably Article 7(2)(a).

[57] It may be different for instance in the cases envisaged in the last subparagraphs of both paragraphs (1) and (2) of Article 11. See also Article 7 (2) (a).

finally, on account of a serious offence or repeated offences against the law relating to the entry and residence of foreigners".

The European Parliament proposed that the present reference in Article 10(3) to "with due regard" (to national rules of procedure) be substituted by "in accordance with", which is certainly a clearer and thus a safer expression. The Parliament also suggested that present reference to the threat that the person "may represent to the public policy or national security of a Member State" be changed to "threat which that person represents".[58] Again this seems to be a preferable option, although it will all depend on the way that the rules are enforced. In this regard the importance of having a uniform judicial authority to control the application of the Convention is once more confirmed.

In the Commission's draft Convention, Article 10(4) establishes that "detailed rules for applying the criteria set out in paragraph 3" to put a person on the Joint List "shall be determined by measures to give effect to this Convention".[59] One important issue in this regard is whether such detailed rules will or will not include the definition of the very concepts of public policy and national security of a Member State referred to in the main text of Article 10(3).

- Residence permits of persons included in the Joint List

Problems may arise when a person whose name is included in the Joint List applies for a residence permit or is even already in possession of a residence permit in one Member State.

When such a person applies for a residence permit in a Member State, the latter shall first consult the Member State that entered the name on the Joint List and shall take its interest into account when deciding on the application. "The residence permit shall be issued for substantive reasons only, notably on humanitarian grounds or by reasons of international commitments." If the residence permit is issued, the Member State that entered the name on the Joint List shall delete the entry.[60]

When the person included in the Joint List is already in possession of a residence permit, the interested Member States "shall consult each other in order to determine whether there are sufficient grounds for withdrawing the residence permit." If the residence permit is not withdrawn, it is again provided that "the Member State which made the entry shall delete it."[61]

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[58] Beazley report of 19 April 1994. Note also that the Committee on Legal Affairs and Citizens Rights suggested that the references in Article 10 (3) of the draft Convention to "a custodial sentence", "information to the effect that the person concerned has committed a serious crime", "serious ground for believing that he is planning to commit a serious crime or that he represents a threat", "a serious offence(...) against the law relating with the entry and residence of foreigners" be all amended to include in those conditions the explicit mention to the existence of a proof of all those facts. However, this suggestion was not accepted by the Committee on Civil Liberties and Internal Affairs in its final report. See idem, pp.18-19.

[59] Article 10(4).

[60] Article 11(1). It is curious that it is the Member State which entered the name that has to delete the entry, rather than a central authority responsible for the Joint List, e.g. at request of the Member State which issued the resident permit.

[61] Article 11(2).

Apparently, after deletion of the name of a person, he or she can only be refused entry in any other Member State (including the Member State which proposed his or her inclusion on the Joint List) according to the rules of Article 7, notably Article 7(1)(c) and Article 7(2)(a) and (b). Note, in particular that Article 7(2)(a) provides that any person may be refused entry to a Member State "if his name appears in the national list of persons who are not to be admitted to the Member State to which he seeks entry." Therefore, a person may have his name erased from the Joint List but may continue having his name included in the national list of the Member State which requested its inclusion in the Joint List. While according to Article 7(2)(a), that person may be prohibited from entering that Member State, he may still enter other Member States... if no other restrictive clause applies.

Finally, Article 11(3) establishes that : "Detailed rules for the application of this Article shall be determined by measures to give effect to this Convention."

- Refusal of entry to a Member State

Article 12(1) is the reverse side of the entry conditions established in Articles 7(1) and 9.[62] It establishes that:

> "Entry into the territories of the Member States shall be refused to persons who fail to fulfil one or more of the conditions set out in Articles 7(1) and Article 9."[63]

Article 12(2) allows exceptions to this general rule "on humanitarian grounds or in the national interest or by reason of international commitments" of the Member States. Permission to enter on these grounds is then restricted to the territory of the Member State that gave the exceptional permission of entry. If the person concerned is on the Joint List, the Member State that let her or him enter shall inform the other Member States of the entry permission.[64]

It is a positive aspect of the Convention that exceptional clauses are not only used to limit entry to Member States, but also to allow it.

Nevertheless, while Article 12(1) spells out an obligation to refuse persons entry and makes exception to it in Article 12(2), Article 7(1) only establishes the requirements (seen together with Article 12(1) again) that are indispensable to enter, but which may not be sufficient. The very wording of Article 7(1) (a "person may be authorised") and the rule of Article 7(2)(a) confirm that conclusion.

- Access to one Member State only

In some cases the access of a third country national can be restricted to the territory of a single Member State. That is the case envisaged in Article 9, allowing the entry to a Member State for stay other than for a short time under the conditions laid down by national law, and also of Article 12(2) on exceptional permission for entry of third country nationals "on humanitarian grounds or in the national interest or by reason of international commitments" of the Member States. Such is also the case of Articles 20, 23

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62 While Article 7(1) makes a detailed list of the requirements for entries for a short stay, Article 9 deals with entries for stays other than for a short time and refers to the relevant national legislation.

63 Emphasis added.

64 The information will be provided in accordance with the manner determined by the implementing measures of the Convention, as established by Article 12(2).

and 25, on the issue of visas or authorisations of entry valid for one Member State only. These will be analysed below, in the part dealing with rules on visas.

Doubts may be raised on the conformity with Article 7A of the EC Treaty of rules limiting the freedom of movement of a third country national to the territory of one Member State only.

- Exchange of information

According to Article 13 the "exchange of information on data contained in the joint list shall be computerised." Article 13(3) adds that:

> "The joint list may be consulted by the competent authorities of the Member States which, in accordance with their national laws, are concerned with: processing visa applications; frontier controls; police checks; and the admission and regulation of the stay of persons who are not nationals of a Member State."[65]

Article 13(2) provides that the creation, organisation and operation of the required computerised system will be the subject of the Convention on the European Information System. This Convention is supposed to "include guarantees for the protection of individuals with regard to the processing of personal data." Work on the Convention on the European Information System is in progress, but agreement on a final draft is not envisaged soon, although it was supposed to have been agreed by 30 June of 1992.[66] The pertinence of a special Convention on the European Information System, to deal with protection of individuals in processing of personal data, arose after the criticism of to the rules of the Schengen Implementing Agreement.[67]

In the framework of the Council of Europe, there are two instruments relevant in this regard. One is the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data of 28 January 1981.[68] The other is a Recommendation of the Committee of Ministers of the Council of Europe on the use of

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[65] Article 13(4) provides that "[e]ach Member State shall inform the Commission and the other Member States of the agencies authorised (...) to consult the joint list."

[66] That was the latest date envisaged by the European Council of Luxembourg, on its instructions to the *ad hoc* working group on Immigration. See Agence Europe, N°5524, 30 June 1991, p.8, as quoted by O'Keeffe, David in "The Schengen Convention: A Suitable Model for European Integration?", *YEL*, 1991, pp.185-219, at 209.

[67] See Boeles, P., "Data Exchange, Privacy and Legal Protection; Especially regarding aliens", in *Free Movement of Persons in Europe: Legal Problems and Experiences*, T.M.C. Asser Institute Colloquium on European Law, Session XXI, 1991, Schermers, H.G. et al. (eds.), Dordrecht, Martinus Nijhoof, 1993, pp.52-57; O'Keeffe, in "The Schengen Convention...", op.cit. at 204-209; Schattenberg, B. "The Schengen Information System: Privacy and Legal Protection", in *Free Movement of Persons in Europe...*, op.cit., pp.43-51; and Verhey,L.F.M. "Privacy Aspects of the Convention Applying the Schengen Agreement" in *Schengen: Internationalisation of Central Chapters of the Law on Aliens, Refugees, Security and the Police*, 2nd.ed., Meijers, H. et al. (eds.), Leiden, Stichting NJCM-Boekerij, 1992, pp.110-134. For a comparison between the Schengen Information System and the European Information System see the paper of Magraner, Ana "Coexistence des différents systèmes informatiques SIS-SIE", presented at the EIPA colloquium "From Schengen to Maastricht", held in Maastricht, on 15-16/12/1994.

[68] ETS, No.108. As mentioned before, it was ratified by 16 countries, including Iceland, Norway, Slovenia and all Member States, except Greece and Italy.

information of a personal nature in the police sector.[69] The Convention is generally regarded as being insufficient for an adequate protection of individuals.[70] Furthermore, not all Member States have ratified it.[71] Nevertheless, the European Parliament rightly proposed the primacy of the mentioned Council of Europe Convention over the Convention on External Frontiers.[72] The Recommendation, although more detailed and envisaging greater protection for the individual, is even of a less binding nature and is not an adequate mechanism to achieve effective protection.

As far as the Community is concerned, on 24 October 1995 a Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data was adopted. However, according to Article 3(2) of this Directive, its provisions do not apply to the processing of personal data "in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union".[73]

Finally, it may be noted that rules on data protection are also included in Articles 7 to 9 and 13 to 25 of the Europol Convention, concluded on 26 July 1995, under Title Vi of the Treaty on European Union.[74] The scope of Europol activities will include matters related to illegal immigrant smuggling and trade in human beings.[75] One of the points that created much controversy during the negotiations concerned precisely the status of the above mentioned Convention and Recommendation of the Council of Europe. In the end, it was decided that these are to be respected by Europol and by each Member State in the processing of personal data related to Europol.[76]

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69 Recommendation No. R (87) (15) of 17 September 1987.

70 See Verhey, op.cit., at 112-113. One example of that insufficiency is the fact that it "has been expressly stated that the Convention does not have direct effect within the national legal systems and therefore no directly enforceable rights can be derived from it", as stated in its Explanatory Memorandum. See idem, p.112, main text and footnote 6. Besides, its Article 9 has a very broad derogatory clause.

71 Up to the first of January 1995, the only Member States which have not ratified the Convention were Greece and Italy, although they did sign it. Furthermore, before 1990, only Austria, France, Germany, Luxembourg, Spain, Sweden and the United Kingdom had ratified it. Iceland and Norway also ratified the Convention. Portugal only ratified the Convention with effect from 1/1/1994.

72 To be included in the eighth recital of the Preamble of the Convention on External Frontiers and in Article 26 of the latter together with the primacy of the E.C.H.R. and of the U.N. Treaties on Refugees. See the EP Beazley report of 19 April 1994.

73 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31 of 23/11/1995. This Directive is meant to make Member States "protect the fundamental human rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data (Article 1). In the Directive, detailed provisions regulate matters such as : the criteria for making data processing legitimate, the information to be given to the data subject, the data subject's right of access to data, the data subject's right to object to the processing of personal data, the confidentiality and security of processing of personal data, and the transfer of personal data to third countries. According to Article 8 of the Directive, "the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life", is in principle prohibited.

74 OJ C 316/2, of 27/11/1995.

75 Article 2(2) of the Convention.

76 Article 14. See also the subsequent Articles of the Europol Convention, which contain further rules on data protection and use.

(v) "Accompanying measures"(Title V)

- Reinforcement of responsibilities of carriers[77]

Article 14 establishes the duty of the Member States to adopt national legislation obliging carriers of persons to take "all necessary measures to ensure that persons coming from third countries are in possession of valid travel documents and of necessary visas"("and to impose appropriate penalties on carriers failing to fulfil this obligation") and to assume responsibility for accommodation and expulsion of a "person coming from third country who is refused admission", when that will be "required by the control authorities".

There seems to be the risk that the possession of the required documents to enter the EC may eventually become more important in practice than the right of entry itself. This is due to the fact that the stress of the first indent of Article 14(2) is on the possession of documents rather than on the right itself, for instance the right to request asylum and entry for that purpose. Clearly, persons escaping from persecution may not always be able to present the documents normally required to enter a Member State, while according to international rules they should be able to escape persecution and present their claim to asylum. With these concerns in mind, the European Parliament proposed the deletion of Article 14.[78]

Equivalent rules of the Schengen Implementing Agreement[79] have been also criticised due to the fact that they prevent genuine asylum-seekers from entering the EC to escape from persecution and presenting their claims to asylum. In this draft Convention the substantial difference is again that the jurisdiction of the EC Court of Justice may ensure an effective application of the reservation established in the beginning of Article 14. It provides that the responsibilities of carriers is without prejudice to Article 27 of the Convention, which establishes the primacy of human rights instruments such as the U.N. instruments on the protection of refugees.

- Consequences of illegal crossing of external frontiers or illegal stay

Article 15 establishes the consequences of the illegal crossing of the external frontiers and the illegal stay in a Member State.

It may happen that a person "illegally crosses an external frontier without having a residence permit".[80] It may also happen that a person does not fulfil, or no longer fulfils the conditions of residence in a Member State. In all these cases the person "shall normally

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[77] See Cruz, Antonio, "Carrier Sanctions in Five Community States: Incompatibilities between International Civil Aviation and Human Rights Obligations", CCME Briefing Paper No.4, Brussels, CCME, April 1991, updated by the same author in "Carrier Liability in the Member States of the European Union", CCME Briefing Paper No.17, Brussels, CCME, September 1994. See also by Cruz, Antonio *Shifting Responsibility: Carrier's liability in the Member States of the European Union and North America*, Staffordshire, Trentham Books, 1995.

[78] The EP Beazley report of 19 April 1994.

[79] Its Article 26. See also its Article 27.

[80] These seem to be cumulative conditions. It does not seem possible (simple because of the Convention and just because of the illegal crossing) to expel a person who illegally crosses an external frontier but has a residence permit.

be required to leave the territory of a Member State without delay, unless his stay is regularised".[81]

If that person resides legally in another Member State,[82] "he shall go to the territory of that Member State without delay, unless he is authorised to go to another country where he is certain to be admitted."[83] Article 15(2) establishes that:

> "Where such a person has not left voluntarily or where it may be assumed that he will not so leave or if his immediate departure is required for reasons of national security or public policy, he shall be expelled as laid down in the legislation of the Member State in which he was found."

According to the same provision, the person may be expelled either to his or her own country of origin, or "to any other country to which he may be admitted, notably under the relevant provisions of readmission agreements between Member States."[84]

-readmission agreements

The last reference relates to Article 15(4), which provides that Member States may conclude bilateral agreements among themselves on the readmission of persons who are not entitled under Community law.

- Compensation for financial imbalances between Member States due to expulsions

Article 16 provides for mutual financial compensation between Member States when the expulsion of persons in irregular situation "cannot be effected at the expense of the person concerned or of a third party". Implementing measures of the Convention will set out "the appropriate criteria and practical arrangements" to that effect.

c) Legal limits and legal relations of the Convention

- Relations with EC Law

In the draft Convention, there is no explicit rule similar to that of Article 134 of the Schengen Implementing Agreement, which establishes that:

> "The provisions of this Convention shall apply only in so far as they are compatible with Community Law".

However, this should not be seen as allowing in any way whatsoever for the violation of EC Law by the Convention, namely due to the repeated statements on the provisions of the present draft Convention that the latter is not to prevail over Community rules.[85]

Community Law is explicitly referred to by several substantive provisions of this draft Convention. The definition in Community Law of who is entitled to enter and reside in a EC Member State is fundamental for the personal scope of the Convention's provisions. Internal frontiers are taken as defined by "instruments enacted under the EC

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[81] Article 15(1). Clearly the word "normally" here does not help to clarify the meaning of the provision: will the person be expelled unless his or her stay is regularised, or are there other possibilities to stay in the country?

[82] In the words of the Convention, if "such a person holds a valid residence permit or provisional residence permit issued by another Member State".

[83] Article 15(1).

[84] In relation to residents in an EC Member State, an equivalent rule to that of Article 8(5) is established by Article 15(3): "a list of the resident permits or provisional residence permits issued by the Member States shall be drawn up by measures to give effect to this Convention."

[85] See also the second and third recitals of the draft Convention.

Treaty".[86] Control of persons at airports will be made "without prejudice to Community baggage inspection measures".[87] Implicit reference also seems to be made to secondary instruments of Community Law when Article 7(2) states that: "Any person may be refused entry (...) in all circumstances in which a national of a Member State may be refused entry to another Member State." According to Article 14(1), incorporation into national legislation of measures on responsibilities of carriers will also be made without prejudice to "instruments enacted under the Treaty establishing the European Community". A similar reservation is made by Article 17 in relation to visas, where it provides that Member States will progressively harmonise their visa policies "without prejudice to decisions adopted under Article 100C of the [EC] Treaty."

Furthermore, certain provisions of the present draft, which limit the movement of third country nationals between the Member States, may raise problems under Article 7A of the EC Treaty from the perspective of total abolition of border controls.[88]

Following what was suggested in the previous chapter,[89] it is submitted that in the case of concrete conflict between rules of the External Frontiers Convention and rules of Community instruments, Community instruments should prevail.

- Primacy of international instruments and constitutional rules on human rights

According Article 27(1) of the present draft

> "This Convention shall be subject to the European Convention of Human Rights and Fundamental Freedoms of 4 November 1950 and to the Geneva Convention of 28 July 1951, as amended by the New York Protocol of 31 January 1967, relating to the Status of Refugees and without prejudice to the more favourable constitutional provisions of Member States on asylum."

This is one of the most important provisions of the Community's draft. Similar references to the international instruments on refugees was also made by Article 135 of the Schengen Implementing Agreement. However, only the attribution of jurisdiction to the EC Court of Justice made by the present draft Convention (and not in the Schengen Agreements) gives the insurance that such a reference will be fully translated into legal practice.[90]

The primacy of more favourable constitutional provisions of the Member States on asylum appears to seek to anticipate eventual criticisms and avoid legal problems in the process of ratification of the Convention.

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[86] Article 1(h)(i). Community rules defining intra-Community flights and sea-crossings are Article 2, paragraphs (3) and (5) - respectively - of Council Regulation 3925/91/EEC of 19/12/1991 concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking an intra-Community flight and the baggage of persons making an intra-Community sea crossing, OJ L 374/4 of 31/12/91. See p.9 of the Commission's Explanatory Memorandum on the Draft Convention, COM (93) 684 final.

[87] Article 6(2).

[88] See the above mentioned remarks of O'Keeffe, in "The new Draft...", op.cit., at pp.143-144.

[89] See part 6 of section A of chapter 7, on relations between Title VI of the Treaty on European Union and the European Community.

[90] See infra the part on the jurisdiction of the EC Court of Justice on this Convention.

As already mentioned, the European Parliament proposed that the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data also takes primacy over this Convention on External Frontiers.[91]

- Bilateral Conventions on local traffic

The present Convention is not supposed to affect bilateral Conventions on local traffic.[92] While at first sight this may be considered a matter of secondary importance, in practice it may acquire considerable significance in some frontier regions, such as those close to the borders with Switzerland.

- Relations with Third States

In the Treaty on European Union, although Article K.7 allows for closer cooperation between Member States, there is no explicit reference to relations between Member States and third countries as far as Justice and Home Affairs are concerned. Nevertheless, in the draft External Frontiers Convention, Article 28 rules on the relations of Member States with third States on frontier controls. It provides that:

> "A Member State which envisages conducting negotiations on frontier controls with a third State shall inform the other Member States and the Commission accordingly in good time",

and that, with the exception of agreements on local traffic, a Member State shall not :

> "(...) conclude with one or more third States agreements simplifying or removing frontier controls without the prior agreement of the Council."

An interesting issue concerning the relations of Member States with third states is the situation of Denmark, Sweden and Finland within the Nordic Union.[93] Although, apparently, recent developments have reduced the practical relevance of old arrangements, the Nordic Union had virtually abolished internal border controls between its Member States: Denmark, Sweden, Norway, Finland and Iceland.

Norway and Iceland are not Member States of the European Union. Thus a difficulty rises on the controls of the external borders of the European Union with those two countries. The case of Norway is particularly clear in this respect. Norway is the only Nordic country which is not a Member State of the Union and which has land borders with the Union - through Finland and Sweden, which are members of the Nordic Union.

The previous draft Convention on External Borders, of the *ad hoc* immigration group, addressed the problem of the control of the borders between Denmark and other Scandinavian countries in a Declaration annexed to the Convention. In that declaration Denmark undertook the general responsibility of engaging in talks with the other members of the Nordic Union. The aim of such talks would be to assure that those other countries made in their external borders controls on persons equivalent to those provided by the

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91 See the Beazley report of 19 April 1994.

92 As defined by Article 1(i), according to Article 27(1).

93 See also, infra, the reference to the parallel Convention (to this External Frontiers Convention) to be negotiated with third states.

Convention on External Borders. The present draft Convention of the Commission does not seem to have addressed this problem at all.[94]

d) Adoption, Implementation and Judicial Control of the Convention

- Declarations on the adoption of the Convention

The draft decision of the Council would have recommended to the Member States the adoption of the draft Convention by the end of 1994, a date to be revised.

In relation to the adoption of the Convention, an interesting point is referred to by the Commission in its Communication to the Council and the European Parliament, when it states that :

> "The Convention is now established by the Union and should not therefore include a Final Act. The Member States could, however, submit declarations to be recorded in the Council minutes."[95]

This statement probably expresses a wish to reduce the legal force of eventual declarations made by the Member States on the Convention. In fact, those declarations could lead to ambiguity on the commitments of the Member States regarding the Convention provisions, similar to what occurred in the case of some common declarations annexed to the Single European Act.[96] If the intention of the Commission was to reduce the legal force of eventual Member State's declarations, perhaps it had in mind the judgment of the European Court of Justice in the Antonissen case. There, the Court ruled on a declaration made by all members of the Council and entered in the Council minutes at the time of adoption of Regulation 1612/68 and Directive 68/360/EEC, declaring that

> "such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance."[97]

In this perspective, future declarations of the Member States recorded in the Council minutes would be seen as mere political declarations.

Presumably, the Commission would not mind making a subtle redefinition of the classical character of the Conventions drawn up under the rules of Article K.3(2)(c).[98]

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[94] On the topic of border controls see also the reference made in chapter 6 to the negotiations for the accession of Scandinavian countries to the Schengen Agreements.

[95] Point 19 of the Explanatory Memorandum, COM (93) 684 final, p.10.

[96] Their legal status is not clear, but they are frequently mentioned to demonstrate that Member States wanted to limit the extent of the Single European Act provisions. See section C of chapter 3 for an analysis of the legal status of declarations of Member State's governments on the Single European Act. To a considerable extent such analysis is also useful for the issue here in question.

[97] Case C-292/89, Antonissen [1991] ECR I-745, at 778, paragraph 18. Pointing in the same direction see Case 237/84, Commission v. Belgium, [1986] ECR 1247, paragraph 17.

[98] As remarked by O'Keeffe, in "The new Draft...", op.cit., p.143. In the same direction points Article 2(1) of the draft "Council Decision (...) establishing a Convention on Controls on Persons Crossing External Frontiers". It states that : "The Convention shall enter into force on the first day of the second month following the deposit of the instrument of adoption (...) by the last Member State to take that step" and that "provisions concerning the adoption of measures in implementation of the Convention shall apply from the first day of the third month following that date." It is certainly not customary that the entry into

This aim could even have positive aspects to the extent that it would contribute to diminishing legal uncertainty. However, one may legitimately wonder whether this would be possible to achieve in the manner envisaged by the Commission and if that manner conforms to the rules of the Treaty on European Union.[99]

It should be emphasised that the general legal status under Community Law of the declarations inserted into the Council minutes, on the occasion of the adoption of EC instruments, remains unclear. It is not to be excluded that, in the future, the EC Court of Justice may take a different decision from that of the Antonissen case, considering the specific characteristics of the situation at stake.

Furthermore, it is not yet certain which judicial authority will be called to rule on the present issue. The importance of the jurisprudence of the Court of Justice of the European Communities on similar cases would be limited if it had no jurisdiction on the matter.

Finally, the Commission's suggestion to abolish a Final Act, and to record eventual Member State's declarations in the Council minutes, does not seem to be required by any provision of Title VI of the Treaty on European Union. Actually, it appears difficult to sustain that the fact that the Council "draws up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements", excludes the possibility of the governments of the Member States to make declarations on the Conventions approved.

In any case, this issue is a good example to corroborate the need for a common judicial interpretation of the Convention, not to mention the relevant provisions of Treaty on European Union itself. To leave their interpretation in the hands of several national jurisdictions, with the risk of different and contrasting interpretations, all with the same legal force, is perhaps not a very good idea.

- Implementing Measures

Implementing measures, or "measures to give effect to this Convention", according to the text of the Commission's draft, are planned to be adopted in relation to a very wide range of issues.

In relation to the voting procedure for the adoption of common implementing measures of the draft Convention, its Article 26 states that:

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force of an international Treaty such as the Convention at stake is determined by another instrument and not by the Convention itself. The governments and the parliaments of the Member States could object to this point of the draft decision of the Council. Note likewise, but admittedly on a less important aspect, the Commission's statement that "as the Convention is being concluded under the European Union, the instruments of ratification now have to be deposited with the Secretary-General of the Council, as for conventions concluded under Article 220 of the EC Treaty". See the Explanatory Memorandum of the Commission, at p.8. To the knowledge of the present author there is no legal rule justifying the Commission's assertion of the existence of a legal obligation to do that.

[99] O'Keeffe states that the "suggestion to omit a Final Act, a normal act of international treaty-making, does not appear necessary or to follow from the text of the Treaty". He also remarks that the Commission's suggestion to "introduce a new form of Declaration, recorded in the Council Minutes (...) would add to the uncertainty as to the legal status to be attributed to declarations, and in some cases, as in the case of a unanimous Declaration which makes specific reference to a provision of the Convention, this may be serious, and create serious difficulty as regards the interpretation of the underlying convention." See O'Keeffe, in "The new Draft...", p.143.

"Decisions needed to give effect to this Convention, other than those expressly provided therein, shall be adopted by the Council, acting unanimously on a proposal from the Commission or on the initiative of a Member State."

This rule constitutes an exception to the exception established in Article K.3(2)(c) second paragraph to the general unanimity rule prevailing in Title VI of the Treaty on European Union. While the general rule in Title VI of the Treaty is the adoption of decisions in the Council by unanimity, Article K.3(2)(c) provides that measures implementing Conventions "(...)shall be adopted within the Council by a majority of two-thirds of the High Contracting Parties" "[u]nless otherwise provided by such conventions...". The draft Convention, in its Article 26, precisely provides for decision by unanimity, although only if they are not expressly provided for in the final text of the Convention.[100]

The Commission's proposal for the adoption of such implementing measures by unanimity may be explained by the fact that the Convention already provides for the adoption of implementing measures in a very broad area.[101]

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[100] Attention should be given to the European Parliament's proposed draft of Article 26, which, apparently not changing the substantial rule, makes, contrary to the Commission's draft, a clear distinction between implementing measures of the Convention "expressly provided therein" and "[o]ther decisions needed to give effect to this Convention". The Parliament proposal also adds that "[i]n either case decisions of the Council will be taken having consulted the European Parliament, as foreseen in Article K.6." See the Beazley report of 29 March 1994.

[101] The matters to be dealt with by implementing measures of the Convention include: a) exceptions and specific rules applying to particular categories of maritime traffic for the crossing of external frontiers, and the arrangements for local frontier traffic (as established by Article 2.5); b) detailed rules for applying the controls at external frontiers, including relaxing them (Article 5.3 and 5.4); c) determination of the conditions for the Member States to take back any person to whom they have issued a residence permit or provisional residence permit within the meaning of Article 8(1) and (2) and who is illegally resident in the territory of another Member State (Article 8.3); d) the drawing up of a list of residence permits and provisional residence permits referred to in [Article 8] paragraphs 1 and 2 which shall be accepted as equivalent to visas (Article 8.5); e) the drawing up of an indicative list of the exceptional circumstances in which Member States' authorities shall accept the provisional residence permits and the travel documents referred to in [Article 8] paragraph 2 as equivalent to visas (Article 8.5); f) detailed rules for applying the criteria generally set out in Article 10.3 to put a person on the joint list of persons to be refused entry at the external borders (Article 10.4); g) detailed rules for application of Article 11, on the issue, holding or withdrawal of a residence permit in relation to a person whose name is on the joint list of persons to be refused entry (Article 11.3); h) the drawing up of a list of residence permits and provisional residence permits issued by the Member State (Article 15.3); and i) determination of the appropriate criteria and practical arrangements for compensation between Member States for eventual financial imbalances resulting from Member States' expenses for expulsions (Article 16).

In relation to visas, the following issues will also be dealt with by implementing measures of the Convention: a) definition of the period after which the absence of reply, from the central authorities of a Member State wishing to be consulted on the issue of a visa by another Member State, shall be regarded as indicating that there is no objection to the issue of the visa (Article 20.1(3)); b) general rules for implementing Article 20, on prior consultation of central authorities of another Member State for the issue of a visa (Article 20.2); c) determination of conditions and criteria for issuing multiple-entry uniform visas (Article 21.2); d) the principles established in Article 22 on the State and authorities responsible for the issue of uniform visas (Article 22.3); e) supply of information to the other Member States by the Member State that made an exceptional issue (according to Article 24.2) of a visa to a person that is in the joint list of persons to be refused entry (Article 24.3 in fine).

It may also be seen as an anticipation of a likely insistence of the Member States to require unanimity for the adoption of those measures. Such Member States' position is particular likely to occur regarding the sensitive matters to be dealt with by the implementing measures.[102] In this sense the Commission's proposal would show that it preferred to immediately propose a rule easily acceptable to the Member States' governments, taking, instead, the risk of conflict on other issues - such as the jurisdiction of the EC Court of Justice.

- Jurisdiction of the EC Court of Justice

Article 29 of the draft Convention provides that:

> "The Court of Justice of the European Communities shall have jurisdiction:
> - to give preliminary rulings concerning the interpretation of this Convention; references shall be made as provided in the second and third paragraph of Article 177 of the Treaty establishing the European Community;
> - in disputes concerning the implementation of this Convention, on application by a Member State or the Commission."

This is, perhaps, the most important novelty of the Convention in relation to the previous draft of the *ad hoc* immigration group, not to mention the Schengen Agreements. One of the more important criticisms made of the two latter texts, and of the intergovernmental instruments in general, was precisely the fact that they were not subject to a uniform judicial control. A judicial control that could, for instance, be ensured by the Court of Justice of the European Communities.

One of the reasons that makes some legal authors advocate the attribution of jurisdiction to the EC Court of Justice is the hope that the latter would apply to the matters at stake the positive aspects of its jurisprudence on Community Law.[103]

The present author agrees that the EC Court of Justice is the best judicial authority to have jurisdiction on the interpretation of the present Convention. However, in any case, the need for a uniform judicial control of the Convention is evident irrespective of what Court is charged with it. A uniform judicial control is indispensable for the rules of the Convention to have the same meaning in all the Member States, without being subject to divergent or even opposite interpretations of different national judicial systems.[104]

Furthermore, according to Article 14, each Member State is obliged to incorporate into its national legislation, measures on responsibilities of public service international carriers to ensure that persons coming from third countries are in possession of valid travel documents and necessary visas (including appropriate penalties on carriers failing to fulfil this obligation), as well as measures to oblige the carrier, where required, to assume responsibilities without delay (including eventually covering the cost of accommodation until departure) and to return a person coming from a third country who is refused admission at the first control on entry to the Community territory.

Finally, Article 15.4 provides that, at the request of one Member State, "Member States shall conclude bilateral agreements between themselves on the readmission of persons who are not entitled under Community Law."

[102] Member States may even require unanimity for adoption of measures already planned by the Convention.

[103] See O'Keeffe, "The New Draft ...", op.cit., pp.144-145, quoted in part 4, section B of chapter 7.

[104] See the analysis made in chapter 7 on the need for a common judicial authority with jurisdiction on the activities and decisions taken on the matters covered by Title VI of the Treaty on European Union. There it is argued that the Court of Justice of the European Communities is the best Court to have such a jurisdiction.

This seems particularly obvious in relation to some concepts or expressions used in the Convention, like "national security",[105] "public policy",[106] person representing a threat to "international relations",[107] "sufficient means of subsistence",[108] "serious crime",[109] "serious offences",[110] "humanitarian grounds"[111] and "national interest".[112] These concepts are very imprecise and often have different meanings in different national legal orders. It seems difficult to justify that their interpretation should not have a uniform judicial control, being made by national courts only.[113] The jurisdiction of the EC Court of Justice is even more important for the definition of crucial legal concepts when the Convention does not even envisage their definition by implementing measures,[114] or when this possibility is not very clear.[115]

In this respect, it should also be highlighted that a uniform judicial definition of concepts can be important both from a perspective that tries to defend human rights and from a perspective that is concerned with preventing and repressing immigration to the European Union. The latter is due to the fact that the Convention contains exceptional clauses allowing for the entry of persons which are also based on the use of broad legal concepts (e.g. humanitarian grounds).

Furthermore, a uniform judicial control of the Convention would certainly contribute to ensuring a proper application of Article 26, which provides for the primacy of the European Convention of Human Rights and Fundamental Freedoms and of the Geneva Convention on Refugees, as well as the New York Protocol to the latter.[116]

Naturally, the same reasons that justify the attribution to the EC Court of Justice of the jurisdiction on the Convention are also valid to extend such jurisdiction to the implementing measures of the Convention.

The European Parliament proposed that Article 26 of the Commission's draft be amended so that the Parliament, itself, could also have recourse to the Court of Justice in disputes concerning the implementation of the Convention. Furthermore, the European Parliament suggested the addition of a new paragraph to Article 26, so that:

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105 Articles 5(5), 7.(1)(c), 8(4) ("urgent reasons of national security"), 10(3).

106 Articles 5(5), 7.(1)(c), 10(3). As O'Keeffe recalls, the concept of "public policy" (together with "public security and "public health") have been interpreted by the EC Court of Justice in relation to Article 48 of the EC Treaty. The need for a Court interpretation was not prevented by the adoption by the Community of detailed rules on those concepts, namely Council Directive 64/221/EEC, OJ 56/850 of 4/4/64. See O'Keeffe, "The New Draft...", op.cit., p.145.

107 Article 7.1(c).

108 Article 7.1(e).

109 Article 10.3.

110 Article 10.3.

111 Article 11.1 and Article 12.2.

112 Article 12.2 and 24.2.

113 The present author does not recall the existence in Europe of any other international Convention, of similar importance and sensitivity, which is subject to national judicial interpretations only.

114 See, e.g. the case of "humanitarian grounds" referred in Articles 11(1) and 12(2).

115 See supra the comments on the relationship between Article 10(4) and the main text of Article 10(3).

116 O'Keeffe, "The New Draft...", op.cit., p.145.

"The European Parliament and national parliaments of Member States shall have competence to question the Council concerning the application of this Convention."

In relation to the European Parliament, this proposal seems to constitute only a reinforcement of the vague rules provided on the matter by the third paragraph of Article K.6 of the Treaty on European Union. In relation to national parliaments, while recognising that direct dialogue between them and the Council is not a bad idea in itself, the present author tends not to favour the proposal of the European Parliament. This lies in a structural perspective. What seems to be important is a transparent decision making procedure, namely through a significant involvement of the European Parliament in the work of the third pillar of the Union. The involvement of national parliaments in the latter work may eventually improve its transparency. However, from a structural point of view, it does not seem very coherent to improve the European position of national parliaments in this specific field, while not doing the same in other fields, like in some of those dealt with by the European Community.

Finally, it should be noted that the jurisdiction of the Court of Justice faces strong opposition from the governments of some Member States, as recalled in chapters 6 and 7 as far as the Europol Convention is concerned.

2- RULES ON VISAS

The Commission's White Paper of 1985, on the completion of the Internal Market, envisaged that, with the aim of abolishing internal border controls on individuals, the Commission would present by the end of 1988, a draft Directive on the coordination of visa policies, which was supposed to be approved by the Council by the end of 1990.[117] Following its "pragmatic approach" to the abolition of internal border controls on persons, the Commission did not present this proposal but waited for progress within the framework of intergovernmental cooperation.

The Convention on the Crossing of the External Borders, drafted by the *ad hoc* immigration group, contained several rules on visa policy. Some of these were taken up by the Commission, which, under the new competences introduced by the Maastricht Treaty, included several provisions on visas in the draft Convention on External Frontiers. It also presented two draft Regulations on visa matters.

This section analyses the rules on visas in the Commission's draft Convention and the two draft Regulations proposed.

a) Rules on visas in the draft Convention on External Frontiers

The rules concerning visas in the Commission's draft Convention envisage the progressive harmonisation of national visa policies and the establishment of rules for the implementation and functioning of a uniform visa.

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[117] See the White Paper on "Completing the Internal Market", COM (85) 310, point 55 and p.13 of the Annex.

The harmonisation of national visa policies is envisaged in general terms and it is established that it will be made without prejudice to decisions adopted under Article 100C of the EC Treaty.[118]

A fundamental principle for the establishment of uniform visas is their mutual recognition. Article 18 of the draft Convention establishes that:

> "A Member State shall not require a visa issued by its own authorities of a person applying to stay for a short time within its territory who holds a uniform visa."[119]

Article 19 contains the conditions for the issue of a uniform visa. It is required that the "travel documents presented upon application for a visa (...) be checked to ensure that they are in order and authentic" and that "the expiry date of the travel document (...) be at least three months later than the final date for stays stated on the visa, account being taken of the time within which the visa must be used". The travel document must also be recognised by and be valid in all Member States, and "must allow for the return of the traveller to his country of origin or his entry into a third country". With respect to the last point, it is still required that "the existence and validity of an authorisation or a re-entry visa for the traveller to return to the country of departure (...) be checked if such formalities are required by the authorities of that country", the same being applied "to any authorisation required for entry to a third country."[120] Finally, the conditions for the issue of a visa also include the fulfilment of the entry conditions laid down in Article 7(1) of the draft Convention (except the very holding of a visa).[121]

The European Parliament proposed that common conditions and criteria affecting the issue of uniform visas should instead be established by the draft Regulation concerning the list of countries whose nationals are required to have a visa to cross the EC external borders.[122] The rules proposed by the Parliament on the issue of uniform visas repeat *ipsis verbis* Article 19(2) of the External Frontiers Convention.

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118 Article 17 of the draft Convention on External Frontiers proposed by the Commission.

119 The European Parliament proposed that the expression "stay for short time" be substituted by "stay for a limited period". See amendment to Article 18 as proposed in the Beazley report, of 19 April 1994, doc.ref. A3-190/94/corr. A "stay of limited duration" is defined (in a new alinea (g) of Article 1 of the draft Convention also proposed by the same report) as being "an uninterrupted stay or successive stays the length of which does not generally exceed one year".

120 Article 19(2).

121 Article 19(1).

122 According to a new Article 2a of the draft Regulation, as proposed in the Froment-Meurice's Report of 29 March 1994 on the Commission proposal for a Council regulation determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, made on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, doc.ref. A3-0193/94. That report was adopted in 21 April 1994 by the Legislative Resolution embodying the opinion of the European Parliament on that Commission's proposal, OJ C 128/350 of 9/5/94. Consequently, in the Beazley report, of 19 March 1994, the European Parliament proposed several changes to the rules on the issue of uniform and national visas in the Commission's draft Convention. The following provisions would be completely deleted: Articles 19(2) (on conditions for issue of the uniform visa), but not its paragraph 1 (on the requirement that the prospect visa holders fulfil the entry conditions of Article 7(1) of the draft Convention); the third subparagraph of Article 20(1) (allowing the exceptional issue of a visa with national validity only, in case of an objection or impossibility of consulting the central authorities of another Member State); Article 21 (on multiple entry uniform visa), Article 22, except the first part of paragraph 1, and also Article 24 (on national visas) and Article 25 (on visas for long stays).

Nevertheless, the Parliament's proposed addition to the draft Regulation does not include the extra condition established by Article 19(1) of the draft Convention for the issue of visas: that the person fulfils the conditions for entry laid down in Article 7(1) of the same draft. The absence of this reference in the draft Regulation, as proposed by the amendments of the European Parliament, is perhaps understandable, because the definition of conditions for entry is a matter to be dealt with by the External Frontiers Convention. However, this absence could perhaps cause some practical problems. It would eventually be possible to issue visas to third country nationals who would not fulfil the conditions of Article 7(1) of the draft Convention, and who thus later could be prohibited from crossing the external borders.

In the Commission's draft Convention it is envisaged that a uniform visa may be valid for one or more entries. It is already established that neither "the length of any continuous stay nor the total length of successive stays may exceed three months in a six-month period starting on the date of entry". However, only measures giving effect to the Convention will determine conditions and criteria for issuing multiple-entry uniform visas.[123]

The issue of a uniform visa shall be made by the diplomatic and consular authorities of the Member States. Only exceptionally will other authorities determined by national legislation issue uniform visas.[124] In principle, the Member State responsible for the issue of the visa is that of the main destination of the traveller. "If it is not possible to determine that destination the Member State of first entry shall be responsible" for issuing the visa.[125]

With respect to issuing of uniform visas, a very important new rule was also proposed by the European Parliament: a right of appeal to the competent authorities of the relevant Member State against a refusal to grant a uniform visa.[126]

Nevertheless, in the proposal of the Parliament a point seems odd from the perspective of the divisions of competence between the EC and the third pillar of the Union. The Parliament proposes that the conditions for the issue of uniform visas be regulated by the draft EC Regulation on visas. However, it proposes no changes to some rules of the draft Convention relevant for the issue of those visas. That is the case of Article 19(1) (on some conditions for issuing a uniform visa); Article 20 (on prior consultation of central authorities on the issue of visas), except the third subparagraph of paragraph 1 that would be deleted; and the first part of Article 22(1) - on authorities responsible for the issue of visas (its second part was changed). Furthermore, there are other Articles that, while proposed to be changed, still remain as substantial rules on aspects that are strictly connected with the issue of uniform visas. That is the case of Article 18(1) (on mutual recognition of uniform visas); and Article 23(1) (on the extension of uniform visas). It would be too easy to say that it is difficult for the Parliament to defend EC competence on these doubtful matters and still be coherent, e.g. with the Maastricht Treaty rules on division of competences. In any case, the fundamental problem seems to be a more general and structural one: the lack of precise division of competences between the Community and the third pillar of the Union.

123 Article 21.

124 Article 22(1). The European Parliament proposed eliminating such exceptional issuing of visas by these authorities. See the amendment proposed to Article 22 by the Beazley report of 19 April 1994.

125 Article 22(2).

126 In a proposed new Article 2c of the draft Regulation. As Boeles recalls, commenting the equivalent rules of the Schengen Implementing Agreement; "[r]efusal of a uniform visa may be in breach of rights set forth in the European Convention on Human Rights, for instance (...) the right to family life or the

The Commission's draft Convention leaves the Member States a considerable margin of manoeuvre.

Article 20, for instance, provides for prior consultation of central authorities of a Member State before the issue of a uniform visa by another Member State, where the former wishes to be consulted. It is even envisaged that": "If there is an objection, or if the consultation procedure (...) has not been implemented for reasons of urgency, only a national visa with restricted territorial validity shall be issued".

The obligation to consult the authorities of other Member States may raise important practical problems. In the case of the Schengen system, for example, the French requested that they be consulted on all visa applications by Russians at German and other Member States consulates.[127] It was calculated that it would have required 49 years for all those applications to be processed at the present working rhythm. Therefore a new system to try to solve this problem is presently being studied within the Schengen system.[128]

Another aspect confirming that Member States retain much autonomy is the fact that they may extend the stay of holders of uniform visas and, in some circumstances, may still issue national visas. However, in these cases the extension or visa is valid only in the territory of the Member State concerned.[129] A Member State may, for instance, authorise a holder of a uniform visa to stay in its territory for more than three months.[130] It is also provided that, "if necessary", a Member State may "issue a visa the validity of which is restricted to its own territory to the holder of a uniform visa in the course of any one six-month period".[131] Moreover, a Member State may also issue national visas for stays of more than three months, in accordance with its national law, subject only to the consultation of the joint list of persons to be refused entry.[132]

A final exception allows Member States to issue a national visa, "on humanitarian grounds or in the national interest or by reason of international commitments", to a person who does not meet one or more of the conditions for entry established in Article 7(1) of the draft Convention.[133] In this case, if the person is on the joint list of persons to be refused entry, or if the central authorities of another Member State objected to her or his entry, the issuing Member State has to inform the other Member States. The validity of this visa is also restricted to the territory of the issuing Member State.[134]

In this respect, it must be mentioned that, insofar as it does not provide for such or other equivalent exceptions to the above, the proposal of the European Parliament may become more restrictive to third country nationals than the Commission's draft. This is the case with the proposed deletion of the third subparagraph of Article 20(1), which, in the

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prohibition of inhuman treatment. See Boeles, P. in "Schengen and the rule of law" in Meijers, H. et al. (eds.) *Schengen: Internationalisation* ..., op.cit., pp.135-146, at 141.

127 The total number of similar applications to be submitted to consultation with another Schengen Member State would have been 2.5 million in 1993.

128 Its name is "VISION", standing for Visa Inquiry Open Border Network, *MNS*, 7/1993, p.1.

129 Article 24(1).

130 Article 23(2).

131 Article 23(1).

132 Article 25.

133 Except the very requirement of holding a visa.

134 Article 24(2),(3) and (4).

Commission's draft, allows the exceptional issue of a visa with national validity only, in the case of an objection or impossibility of consulting the central authorities of another Member State.[135]

On the other hand, it may be noted that visas valid for only one Member State may give rise to problems of conformity with Article 7A of the EC Treaty. As O'Keeffe comments:

> "It is striking in view of the Commission's intention to eradicate border controls, that provisions such as Article 12(2), 20 and 23 of the draft Convention(...) implicitly presuppose the maintenance in force of some internal frontier controls."[136]

A final reference must be made to the European Parliament's proposal that a new Article 25 of the Convention provide for the publication by the Council of the implementing measures decided on visas under the relevant Articles of the Convention. Publishing these would certainly improve the transparency of the system. Moreover, at least in principle, it should be considered an indispensable requirement for the entry into force of the concerned implementing measures.

b) The draft Regulation on the List of Visa Countries

Together with the draft Convention on the crossing of the external borders, the Commission presented a "proposal for a Regulation determining the third countries whose nationals must be in possession of a visa when crossing the external frontiers of the Member States".[137]

It may be recalled that a similar list had already been elaborated by the ad hoc working group on immigration, in June 1991. It contained 61 countries whose nationals were subject to a visa requirement by all the Member States.[138] A consultation procedure was provided for in the case of a Member State planning to add or withdraw a country from that list.[139]

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135 The proposed substantial change to Article 25 goes in the same direction. According to the European Parliament's proposal, the possibility included therein of a Member State authorising a territorially restricted extension of the stay of a holder of a uniform visa would be changed to "1.The uniform visa may be extended" and "2. The decisions for extending a visa shall fulfil the obligations incumbent upon the Member State under the Treaty on European Union and this Convention".

136 See O'Keeffe, in "The new Draft...", op.cit., at pp.143-144.

137 COM (93) 684 final, of 10/12/1993, p.39. This draft was adopted on 25 September 1995 as Council Regulation (EC) No.2317/95 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, OJ L 234/1, of 3/10/1995. The Regulation adopted by the Council made some changes to the list proposed by the Commission, but it was not possible to introduce in this chapter the analysis of those changes. It may also be noted that in July 1994, the Commission presented under Article 100C(3) a draft Regulation laying down a uniform format for visas, COM(94) 287 final, of 13/7/1994. This proposal was already adopted as Council Regulation (EC) No.1683/95 of 29/5/1995, laying down a uniform format for visas, OJ L 164/1 of 14/7/1995. This thesis will not examine this Regulation.

138 See Bull.EC, 6/1991, p.107.

139 See Doutriaux, op.cit., at p.228.

The draft Regulation was presented under the powers established in the new Article 100C.[140] This provision, introduced by the Treaty on European Union, gave the Community competence in relation to certain aspects of visa policy - uniform format and list of countries to require visas - previously covered by some Articles of the draft Convention of the *ad hoc* immigration group. The precise extent of the Community competence on visas under Article 100C was already examined in chapter 7. Therefore, this part of the present chapter will concentrate in examining the proposed list of visa countries and the criteria used to compile it.

The list of visa countries and the criteria used to compile it

The list of countries whose nationals will be required to have a visa to cross the external frontiers of a Member State refers to 126 states or territories.

The following countries and territories are not included in this "negative list" of the draft Regulation, therefore their nationals are not required to have a visa for entry: in Western Europe, Iceland, Norway and Switzerland; Cyprus and Malta; in the Central and Eastern Europe, the Baltic states, the Czech Republic, Hungary, Poland, Slovakia and countries from the ex-Yugoslavia; all countries of continental Latin America (except Belize, Guyana and Surinam); developed countries such as Australia, Canada, New Zealand, Japan, United States; and also Brunei, Hong Kong, Israel, Macao, Malaysia, Singapore, South Korea and Taiwan.[141] Curiously, Kenya and Malawi are not included in the list either.

On the other hand, countries included in the list are: Albania, Bulgaria, Romania, Turkey and all countries of the ex-USSR (except the Baltic States); all countries and territories in the islands of Central America (except Jamaica),[142] almost all countries in Africa and most of Asia.

In this respect the work done up to now by the *ad hoc* immigration group and the Schengen group should be recalled. The *ad hoc* immigration group has been registering the number of third countries whose nationals are required to have a visa to enter the Member States. By the beginning of 1994, the nationals of 73 countries were required a visa to enter into all Member States.[143] Within the Schengen system there is a negative and a positive list. In December 1992, while in the negative list there were 126 countries, the positive list contained 19 countries. A third Schengen list includes the countries whose nationals are required to have a visa by some Schengen Contracting Parties only. It counted 31 states.[144]

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[140] Under the amendments suggested by the European Parliament, the proposal would also include as its legal basis Article 3d of the EC Treaty.

[141] It is unclear whether Hong Kong, Macao and Taiwan are or are not supposed to be included in the reference to China, whose nationals have to hold a visa to enter the territory of a Member State.

[142] Bermuda (under U.K. control), Martinique (Fr.) and Puerto Rico (U.S.A.) are not included in the list either.

[143] See the EP Froment-Meurice report of 29/3/1994, p.12.

[144] A document of the Vienna group showed a substantial difference between the visa policies of different European states. It also stated that Germany required visas from nationals of 105 countries and France required the nationals of the largest amount of countries to hold a visa - 137. See the EP report quoted in the preceding note, on p.14. According to the latter, France was also the only Schengen country who

It is possible to question the way in which the inclusion or exclusion of certain countries or territories in the Commission's draft Regulation was decided. The Commission states in the third recital of the Preamble of the draft Regulation that:

> "(...) third countries should be classified according to their political and economic situation and according to their relations with the Community and the Member States, taking into account the degree of harmonisation achieved at Member State level."

The Commission does not add any further information. In this respect, we should perhaps consider the proposals of the European Parliament, according to which :

> the "process of determination [of the list of visa countries] must be based on clearly understood, objective and publicly stated criteria as to why certain third countries' nationals are included on the negative list and others are excluded";[145]

Admittedly, in practice, it could happen that the use of such criteria in compiling the list would in the end not make a substantial difference, notably on the countries included in the list. In any case, it would be an important demonstration to third country nationals that the process of Community decision-making, in such delicate matters, is transparent and not arbitrary.

Moreover, it is only normal that the public administration in a democratic society states the reasons why the liberty or the legal interests of a person are restricted.[146] In this respect the opinion of the Committee on Foreign Affairs and Security may be recalled here. It sustained that, while visa policy has traditionally been an instrument of the foreign policy of States, it should now be transferred to a new sphere for regulating the movement of persons. The visa should also acquire a more positive character as a document conferring certain rights on the holder.[147]

Finally, the Parliament's proposal that the list be regularly updated, on a proposal from a Member State or the European Commission and after consultation with the European Parliament, seems reasonable.[148] The Palma document already proposed a six-monthly revision of such list.[149]

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required nationals of Argentina, Chile, Costa Rica, Mexico, Uruguay and the former Yugoslavia to have a visa.

145 According to the principles added in the first recital of the draft Regulation, as proposed by Froment-Meurice's Report, of 29 March 1994. According to the Parliament, "the list, which is not in conformity with [these] principles (...) must be amended." See idem, note in p.10. There, the Parliament also proposed that "Member States must not impose visa requirements on countries which have for fair and objective reasons been excluded from the list". Furthermore, "(...)no third country whose nationals do not at present require a visa for entry to a Member State should be on the negative list of those countries who are obliged to obtain visas under this Regulation". See idem, p.5.

146 Note, e.g., that in 1995 it was announced that the UK authorities were planning to give to all third country nationals, whose request for entry is refused, a written and specific explanation of the reasons for that refusal.

147 Opinion adopted in 15 March 1994, see the Froment-Meurice's Report, of 29/3/1994, p.19.

148 According to a new paragraph 4 of Article 2 (Article 1 of the Commission's draft Regulation), as proposed in Froment-Meurice's Report of 29 March 1994.

149 Webber, F. " European Conventions... ", op.cit., at p.143.

B - ADMISSION OF IMMIGRANTS

TO A EUROPEAN UNION MEMBER STATE

The Council has to date adopted four resolutions on the admission of third country nationals to the Member States of the European Union. They deal with admission for family reunification, for employment, for study and for pursuing activities as self-employed persons. The resolution on family reunification was the only one to be adopted before the entry into force of the Maastricht Treaty - it was adopted in June 1993, in Copenhagen.[150] The resolution on "limitations on admission of third country nationals for employment" was adopted in June 1994, in Luxembourg.[151] The two resolutions on admission for study purposes[152] and for pursuing activities as self-employed persons were adopted on November 1994.[153]

The resolution on admission for family reunification will be analysed at the end of this section. First, I will first analyse the three resolutions on admission for employment, for study purposes and for pursuing activities as self-employed persons. The analysis of these three resolutions will first deal with their common characteristics and then proceed to the examination of specific aspects of each of them.

1 - Common aspects of resolutions on admission for employment, for study purposes and for pursuing activities as self-employed persons.

All these three resolutions express agreement that the relevant national policies on admission should be governed by certain principles, which "may not be relaxed by Member States in their national legislation".[154] Member States must consider such principles in any proposals for the revision of national legislation, and, in any case, "will endeavour to seek to ensure by 1 January 1996 that national legislation is in conformity with them".

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[150] To be accurate this resolution was adopted by what was then only the meeting of ministers of Member States that were responsible for immigration.

[151] The precise official name of the resolution is: "Resolution on limitations on admission of third country nationals to the Member States for employment". For its content see the Press Release 7760/94 of the General Secretariat of the Council, Presse 128-G (20.6.1994) and Agence Europe, No.6255 (n.s.), 20/21 June 1994, pp.7-8 and No.6259 (n.s.), 25 June 1994, p.11.

[152] Resolution relating to the limitations on the admission of third-country nationals to the Member States for the purpose of pursuing activities as self-employed persons, Press Release 11321/94 on the Justice and Home Affairs Council meeting of 30 November and 1 December 1994, Presse 252-G (1.12.94). See the Lehne report on the "draft Council Resolution on the limitation on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons", of 20 July 1995, made on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, doc.ref. C4-7/95.

[153] Resolution on the admission of third-country nationals to the territory of the Member States of the EU for study purposes, Press Release 11321/94 on the Justice and Home Affairs Council meeting of 30 November and 1 December 1994, Presse 252-G (1.12.94). See also the Caccavale report on "the draft Council Resolution on the admission of third-country nationals to the territory of the Member States of the European Union for study purposes", of 20 July 1995, made on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, doc. ref. A4-181/95.

[154] All quotations of the resolutions' content are taken from their original text, as contained in the corresponding Press Releases.

However, it is explicitly stated that the principles referred to "are not legally binding on the Member States" and do not afford a ground for action by individuals. Therefore, the resolutions are not of a legal nature. They are political declarations of intent. At most, one could perhaps see them as soft-law.

As far as the personal scope of the resolutions is concerned, they do not apply to persons covered by Community Law provisions or agreements with third countries. Neither do they apply to third country nationals who have been allowed admission for the purpose of family reunification. Nevertheless, provision is also made for the family reunification of the persons admitted to enter under the resolutions. In this context a general reference is made by all three resolutions to national legislation, with some differences between the three in the elaboration of the guidelines to be followed. The resolution on admission for employment only refers to admission of the spouse and dependent children. The resolution on students refers to admission of family members in general, but the spouse is the only one for whom possible authorisation to work is envisaged. The resolution on self-employed persons is more detailed. It states that, subject to the resolution on family reunification, the following persons "will in principle be admitted": "the spouse and unmarried children under a maximum age, varying between 16 and 18 years, depending on the Member State concerned".

The three resolutions still do not apply to third country nationals legally resident in a Member State "on a permanent basis" who do not have the right of entry and residence in another Member State. The Council agreed to examine at a later date matters related to the admission of such persons to another Member State.

In all the three resolutions under review there are detailed provisions envisaging, at least as a matter of principle, that persons admitted for a certain purpose cannot extend their stay by invoking another different purpose. The general rule regarding extension of permission to stay is that the conditions justifying initial entry have to subsist, otherwise third country nationals must leave.

The two resolutions on admission for study purposes and for pursuing activities as self-employed persons declare the necessity of avoiding the admission under their provisions of persons who are in fact looking for employment. The same precaution should be taken, as a matter of principle, to avoid the situation in which students and self-employed persons turn out to be in a dependent working relationship, once admitted in the territory of a Member State. These two resolutions also state that the application of the agreed principles does not prevent the application of national rules on public policy, public health and safety (according to the resolution on students) and on law and order, public health, national security, or public security and public order (according to the resolution on self-employed persons). Both resolutions mention as well that there shall be a regular review of their transposition and of the need for amendments to them.

2 - Limitations on Admission for Employment

The most important principle of the resolution on employment is established in clear and absolute terms:

> "Member States will refuse entry to their territories of third-country nationals for the purposes of employment".

The rest of the resolution states to whom and how the resolution applies, explains the grounds for adopting the principle and provides for narrow restrictions of it.

The resolution does not apply to persons seeking admission as students or self-employed persons. Neither does it apply to "casual work in the course of youth exchange or youth mobility schemes, including *au pairs*" or to business visitors - the last category under conditions defined in detail and provided the visit does not exceed six months. Other groups of persons to which the resolution does not apply are: refugees or asylum seekers, "displaced persons who are temporarily admitted" and "persons exceptionally allowed to stay on humanitarian grounds".

According to the resolution, Member States will consider request for admission into their territories for employment:

> "only where vacancies in a Member State cannot be filled by national and Community manpower or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market".

To ensure that Community workers are indeed not available, Member States will make use of the EURES system. This is the network of European Employment Services responsible for exchanging information on clearing vacancies and applications for employment, as provided for in Part II of Regulation 1612/68.[155]

However, it may happen that no one from the two classes of, firstly, workers nationals of a Member State, or, secondly, nationals of a third country lawfully residing in the Member State concerned, are available. Only in this event, Member States may admit third country nationals for employment only "on a temporary basis and for a specific duration" and in four specific pre-determined cases. The first case is when an offer is made to a named worker, or named employee of a service provider and is of a special nature in view of the requirement of specialist qualifications. This repeats an expression used in the previous version of Article 16(3)(a)(i) of Regulation 1612/68, which allowed for a derogation of the principle of "Community preference" in the hiring of workers through the employment services of the Member States.[156]

The second case is one in which an employer offers vacancies to named workers, provided the national authorities accept the reasons invoked by the employer for such offers, in view of a "temporary" labour shortage at national or Community level which "significantly affects the operation of the undertaking or the employer himself". Again, this provision is comparable to that of Article 16(3)(d) of Regulation 1612/68. This is also perhaps the most important exception to the general prohibition on importing labour from third countries. It does not demand any particular qualification of the prospective immigrant worker and leaves to the national authorities the appreciation of the justification for the offer of the vacancy.

A third case is when intra-corporate transferees are transferred temporarily by their company as key personnel. The last category of cases relates to vacancies offered to frontier workers, trainees and seasonal workers. In relation to seasonal workers, detailed

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155 See Regulation 1612/68 of 15 October 1968 (OJ L 257/2 of 19/10/1968) as amended in its second part by Regulation 2434/92 of 27 July 1992 (OJ L 245/1 of 26/8/92) and implemented by the Commission decision of 22 October 1993 creating EURES (OJ L 274/32 of 6/11/93).

156 For an analysis of this principle see supra, section A of chapter 4.

provisions establish further restrictions for their admission. Their numbers have to be strictly controlled on admission to the territory of the Member States; they are to be admitted to undertake well-defined jobs, "normally fulfilling a traditional need in the Community country concerned" and only "if there is no reason to admit that the persons concerned will seek to stay within their territory on a permanent basis".

A third country national will not be admitted for employment "unless prior authorisation was given for him [or her] to take up employment" in a Union Member State. Furthermore, the "initial authorisation for employment will normally be restricted to employment in a specific job with a specific employer".

In relation to the periods of admission for employment the resolution contains detailed standards. A seasonal worker may be admitted for six months only in any period of one year and cannot return to any Union Member State before six months, at least, have gone by. In the first instance trainees cannot be admitted for more than a year, and their stay can only be extended for the time necessary to obtain a recognised professional qualification. Other types of workers coming from third countries may be admitted for a period lasting up to four years.

In the end, the resolution states that Member States may continue to admit third country nationals for employment under "arrangements" concluded by Member States before the approval of the resolution, provided that they were concluded with third countries with which Member States have special links. However, "Member States will undertake as soon as possible to renegotiate such arrangements in accordance with the terms of this resolution." It is stated that this obligation of renegotiation does not apply to arrangements "covering employment of persons for instruction and vocational training purposes". Thus, it can be presumed that the restrictive principles of the resolution apply to the hiring of professors for schools and universities in the Union - with the exception of previous agreements with third countries with which Member States have special links, which do not have to be renegotiated. However, the situation of professors seems to be covered by the general exceptions allowing for admission for employment when an offer is made to a named worker, the offer being of a special nature in view of the requirement of specialist qualifications.[157]

Another important point is the appropriate nature of this resolution, notably of its main principle: the general prohibition on admitting third country nationals for purposes of employment. This is justified, it is claimed, by the "present high levels of unemployment" and the fact that at present "no Member State is pursuing an active immigration policy", having "curtailed the possibility of permanent legal immigration for economic, social, and thus social reasons".

It is indeed true that this resolution does not entail an important change to the immigration policies currently pursued in Union Member States. For a long time now that form of immigration for the purposes of employment has been virtually abolished as a category of entry in the majority of Member States. However, the resolution is perhaps open to criticism in so far as its drafting and substantial content asserts a link between present employment in the Union, on one hand, and immigrants coming from third

[157] In particular circumstances this could eventually apply to the hiring of apprentices also.

countries, on the other. Admittedly, the Council declared in the resolution that it "acknowledges the contribution of migrant workers to the economic development of their respective host countries". However, the risk is that the restrictive content of the resolution reinforces the idea that third country immigrants are the ones to blame for the present unemployment and its effects.

The restrictive content of the resolution is particularly clear in the very narrow scope of the exceptions to the general prohibition of admission for employment. Although the resolution is not legally binding, its principles, in themselves, do not leave a considerable margin of manoeuvre to Member States. This contrasts, to a certain extent, with the binding rules of the Convention on the Crossing of the External Frontiers of the Member States, examined above.

A more concrete reason for criticising the resolution is that, in the future, Member States may feel precluded from granting amnesties to illegal immigrants. Member States may, moreover, discover that the immigration of workers from third countries is in their interest again. Naturally, the resolution can be modified or substituted with any other proper normative act. However, in its present form it does not even provide for a regular review of its content and implementation.

A final interesting point regarding this resolution is the non attribution to third country nationals' resident in a Member State of the right to go to work and reside in another Member State. The granting of such a right, at least on a strict basis (e.g. as long as they are employed and provided no Community national is interested in a certain job), would be consistent with the resolution's objective of reducing unemployment in the Union.

3 - Admission for Pursuing Activities as Self-Employed Persons

The relevant resolution applies to individuals and not to enterprises. The authorisation granted is personal and non-transferable. It is not meant to apply to third country nationals covered by agreements concluded by the Community or by bilateral or multilateral agreements such as GATT, GATS or OECD agreements.

One of the main concerns of the resolution is to distinguish between admission for employment and for pursuing an independent economic activity. Admission for the latter is only allowed when the activity to be pursued brings an economic benefit to the Member State, be it through "investment, innovation, transfer of technology, job creation". The resolution adds that "artists exercising an independent activity of significance may also be admitted".

For the purposes of the resolution an activity as a self-employed person means "any activity carried out in a personal capacity or in the legal form of a company or firm within the meaning of the second part of Article 58 of the EC Treaty, without being answerable to an employer in either case". The reference to Article 58 means that such firms have to be "formed in accordance with the law of a Member State and having their registered, central administration or principal place of business within the Community", according to that very provision.

Furthermore, the resolution provides that only "those associates actively involved and whose presence is necessary in pursuing the company's or firm's aims and its

management may be authorised to establish themselves in the host Member State's territory." It also adds that when those associates "do not have a majority or substantial share holding in the company or firm Member States may reserve the right not to admit them" except as salaried persons.

Detailed provisions exist on the demonstration and examination by national authorities of the fulfilment of the required conditions for admission.

A final point is made by the resolution to allow Member States to admit to their territories third country nationals who "make substantial investments in the commerce and industry of that Member State", provided that "there are important grounds for derogating from the principles of this resolution which restrict the business activities of [such] third country nationals" .

4 - Admission for Study Purposes

The resolution on admission for study purposes declares that "the international exchange of students and academics is desirable" and has "positive implications for relations between the Member States and the States of origin". Yet, this must be read in the context of a subsequent provision stressing that "at the end of their studies, students must in principle return to their countries of origin", and also against the background aim that their admission to the Member States "does not turn into permanent immigration".

The resolution does not apply to school pupils and apprentices. It applies only to graduate and post graduate students and persons participating in "a course aimed at preparing for a specific course of university studies (e.g. providing language training)".

Prospective students have to prove that they have the financial means to pay for their studies and to live in the host country so that they do not need to claim social assistance there, and that "the earning of income is not the principal aim" of the admission. They may also be required by the national authorities to prove that they have "health cover for all risks in the host Member State".

The authorisation for residence has to be "limited to the length of the course". A dacronian measure is established, according to which "[a]ny change in subject will involve a change in the reason for residence". Such a change, "as a rule, argues against a fresh authorisation or an extension", unless it takes place within the initial period of studies. In case of studies lasting for more than one year, the permission to stay "can" be initially given for one year only. In that case the renewal of the permission "will depend" on proof that the student continues to fulfil the requirements for the initial permission and "has passed any tests or examinations set up by the institution in which he/she is studying"

Third country national students, covered by this resolution, "in principle (...) may not engage in gainful employment". It is envisaged that Member States "may allow short-term or subsidiary jobs" if these do not affect the continuation of the studies, nor "represent a vital income for the subsistence of the student". The absolute formulation of this provision is questionable. In practice the only way available for most students from third countries to finish their studies is precisely to engage in some paid employment. Provided that their studies have been recognised to be of general interest, flexible rules should allow students to work to support their studies and to finish them. If Community nationals often need to do that, third country nationals in general need to even more.

5 - Admission for Family Reunification[158]

This subsection will examine the resolution on admission for family reunification,[159] adopted in the framework of the ad hoc intergovernmental cooperation by the EC immigration ministers in June 1993, in Copenhagen.[160] No other instrument dealing specifically with family reunification of resident third country nationals has yet been adopted - within the framework of the Community, within that of the ad hoc intergovernmental cooperation, or under Title VI of the Treaty on European Union.[161] Furthermore, this was the only resolution on admission of third country nationals approved before the entry into force of the Treaty on European Union. The three other resolutions on their admission examined above contain also some provisions on family reunification, but these were restricted in application to the persons admitted under their rules.

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[158] On family reunification in Member States see Cholewinski, Ryszard "The Protection of the Right of Economic Migrants to Family Reunion in Europe", *ICLQ*, Vol.43, July 1994, No.3, pp.568-598; Groupe d'Information et de Soutien des Travailleurs Immigrés, Dossier on "Familles Interdites", *Plein Droit*, No.24, April/June 1994; Joint Council for the Welfare of Immigrants, "Family Reunion Policies in Six European Countries", *Euro-Briefing*, No.1, Spring 1994; Panero, Enrico "Ancora pochi diritti per la famiglia immigrata", *ASPE*, Year 14, 21/9/1995, No.17, pp.26-7; Roth & Turner report of 30 March 1994 on immigration from Central and Eastern Europe and on the harmonisation of family reunion policy, made on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, doc.ref. A3-204/94. See also *Rencontre Internationale pour le Droit de vivre en Famille des Immigrés en Europe (Brussels, Novembre 1993) - Rapport introductif & conclusions*, Paris, Fonds d'Action Social pour la Coordination pour les Droits des Immigrés à vivre en Famille, 1993; and the Working document of the EC Commission on "Family reunification in the light of international law, Community law and Member States' laws and/or practice", SEC (92) 513, of 13/3/1992. This document was intended to provide a factual background for immigration minister's discussions in the intergovernmental fora, such as the Ad hoc Group on Immigration. Its chapter 1 deals with the relevant International Law on the matter, while its chapter 2 refers to Community Law, and chapters 3 and 4 deal with national legislation of the Member States. For a general overview of the issue of family reunification in International and national Law see Plender, R. *International Migration Law*, 2nd. ed., Dordrecht, Martinus Nijhoff, 1988, chapter 11, at pp.365-392.

[159] Resolution on "Harmonisation of national policies on family reunification", Ad Hoc Group Immigration, Brussels, 3 June 1993, doc.ref. SN 2828/1/93, WGI 1497, REV 1. Published in *A new immigration law for Europe?*, by Boeles, P. , Fernhout, R. , Groenendijk, C.A. , Guild, E. , Kuijer, A., Meijers, H. , de Roos, Th. , Steenbergen, J. & Swart, A.H.J. , Utrecht, Dutch Centre for Immigrants, 1993, at pp.78-82. For an analysis of this resolution see by the Standing Committee of experts in international immigration, refugee and criminal law, *Harmonisation of Family Reunion Policies with regard to third country nationals in the Member States of the EEC - Advice of the Standing Committee of Experts*, Utrecht, 1993. See also Boeles, P. & Kuijer, A., "Harmonisation of Family Reunification", in *A new immigration Law for Europe?*, op. cit., pp.25-34; and Spencer, M., *States of Injustice - A Guide to Human Rights and Civil Liberties in the European Union*, London, Pluto, 1995, at pp.112-3.

[160] The resolution was adopted, although on that occasion the Dutch delegation expressed a parliamentary scrutiny reservation on its text.

[161] It may be recalled that the EEA Agreement protects the rights of family reunification for nationals of Norway, Iceland and Liechtenstein residing in the Member States, in a manner identical to that of the EC rules on free movement of persons. The latter were analysed in section B of chapter 4.

This subsection will first refer to the content of the resolution. Then, it will compare the resolution principles' with the rules of international treaties on the matter, and with the relevant EC rules on free movement of workers. Finally, a general assessment of the resolution will be made.

a) Content of the resolution

According to the immigration ministers, the resolution on family reunification was adopted with two ideas in mind. One was the fact that family reunification was already governed by national laws and international Conventions, the latter not being affected by the "process of seeking further harmonisation" of national policies on the matter. The other was the "need to control migration flows into the territories of the Member States", which, as the resolution declares, "is considered to be one of the factors for the integration of immigrants who are lawfully resident in the territories of the Member States." Thus, the resolution is meant to deal only with the admission of third country nationals for the purposes of family reunification. National legislation or practice, with "no direct bearing on the right of entry and stay", are not to be affected by the principles of this resolution.[162]

Having the above ideas in mind, the immigration ministers expressed their resolve that national policies in respect of family reunification be governed by certain principles. The ministers agreed to consider such principles in any proposals for the revision of national legislation, and "seek to ensure by 1 January 1995 that their national legislation is in conformity with them". However, like in the three resolutions on admission of third country nationals examined in the previous chapter, it is explicitly stated that the principles agreed upon "are not legally binding on the Member States and do not afford a ground for action by individuals". Therefore, like the other three resolutions, this resolution is not legally binding. It is a political declaration of intent, which may have practical effect in national legislation, but is not legally binding on the Member States. This must not be forgotten when later I comment on the effect of expressions or concepts used in the resolution.

The resolution applies to third country nationals lawfully resident within the territory of a Member State "on a basis which affords them an expectation of permanent or long-term residence." Persons who do not have such an expectation, like students or persons admitted to employment for a fixed term, are not covered by the resolution. The determination of what constitutes an expectation of permanent or long-term residence is to be made by reference to national laws and policies. Moreover, this resolution does not apply to national policies regarding relatives of nationals of Member States, nor to persons protected in this respect by Community rules on free movement of persons or by the EEA Agreement. The family reunification of refugees is not affected by the resolution. On the other hand, the resolution seems to apply equally to the family reunification of a resident in a Member State with relatives that reside in another Member State, as to that of a resident with relatives residing in a third country. However, it could be argued that family reunification of the former type (with relatives that reside in another Member State)

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[162] Paragraph 12 of the main text of the resolution.

should be governed by more liberal principles than that of the latter type (with relatives residing in a third country).[163]

The resolution provides that Member States "reserve the right" to require that third country nationals be legally resident in their territory "for certain periods of time" before family reunification is authorised. However, the resolution makes no mention of what could be the extent of such waiting periods.

The relatives to whom Member States "will normally grant admission" (after the waiting period) are the resident's spouse and the children of both "the resident and his or her spouse." They can only be admitted "for the purpose of living together with the resident".

The resident's spouse has to be "bound to him or her in a marriage recognised by the host Member State". In addition, Member States "reserve the right" to refuse entry and stay to a spouse if they determine that the marriage was "contracted solely or principally for the purpose of enabling the spouse to enter and take up residence in a Member State". This corresponds to the "primary purpose rule", introduced in the United Kingdom in 1982.[164] According to the resolution, a wife of a polygamous marriage, as well as her children, "will not be admitted" for family reunification, in a case where the resident has already another wife resident in a Member State. When only children of another wife are resident there, Member States "reserve the right" to refuse admission to the wife and her children of a polygamous marriage.[165]

As far as children are concerned, to be admitted for family reunification they have to be below a maximum age, agreed by the ministers to be "between 16 and 18 years". In addition, they "must not have married, or have formed an independent family unit or be leading an independent life".

Further principles apply to the admission of adopted children and to children of only one member of the couple concerned. First, adopted children will "normally" be admitted, provided they were adopted by both spouses (of the couple concerned) while residing together in a third country. The adoption made in the third country should have been arranged according to a decision taken by the competent authority of that country, this decision being recognised by the Member State of residence. The adopted child must have the same rights and obligations as the other children of the couple and must have had "a definitive break with the family of origin". Secondly, it may occur that a child was adopted by both spouses, but while one or both of them were already resident in a Member State. In this case the fulfilment of the same conditions is required, but Member States "reserve the possibility" of admitting that child. Thirdly, the "primary purpose rule" is applied also to the adoption of children. It is stated that Member States "will consider" whether an adoption was arranged

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[163] See point 31 of the draft resolution included in the Roth & Turner report of 30 March 1994, quoted supra, in which the European Parliament asked for the application to this type of family reunification of the relevant EC rules on free movement of persons.

[164] In that country, the zealous application of that rule led for some time to the performance of virginity tests to potential brides of immigrants from the Indian subcontinent. This practice was latter abandoned as being degrading and unjustified. See Spencer, M. , *States of Injustice...*, op. cit., p.112.

[165] On the family reunification with the polygamous wife see Plender, R. , op.cit., at pp. 382-4.

> "solely or principally for the purpose of enabling the child to enter and take up residence in a Member State, and whether to refuse permission to enter and stay accordingly".

Finally, Member States do "reserve the option" of admitting a child who is an offspring of only one of the couple concerned. This applies also to a child who was adopted by one of the spouses only. To decide whether or not to admit any of those children, Member States "shall consider" whether each or both of the spouses "hold parental authority, have been granted custody of the child and have the child effectively in their charge".

As far as other relatives of the resident person are concerned, Member States "reserve the possibility" of allowing for their entry and stay when "compelling reasons" justify it. No further reference is made to this possibility, or to the "compelling" reasons that may justify it.

As far as conditions of stay are concerned, provision is made regarding the residence status of the admitted family members. It is provided that the authorisation to stay, which is granted for the resident relatives, may be "conditional upon the continued fulfilment of the criteria required for admission." It is for Member States to determine the duration of the period in which the authorisation to stay remains conditional.

However, it is agreed that, "within a reasonable period of time" and "in accordance with the national legislation", family members may obtain an authorisation to stay on their own, independent of the residence status of whom they came to live with. Nonetheless, it is provided that the authorisation for a family member to stay "may be terminated at any time if there are grounds for presuming that it was obtained by means of fraud or forgery". It may be noted that this "principle" is quite severe on the consequences of fraud, while it is vague on the verification of conditions for its application - merely referring to the existence of "grounds for presuming...".

Provisions are also made regarding the procedure to be followed to obtain admission to a Member State for the purpose of family reunification. Admission will "not normally" be granted without a visa or other prior written authorisation for that purpose. The application "must normally" be made while the family member concerned is not in the Member State into which he or she asks entry. Furthermore, family members "must, in principle" hold valid travel documents which are recognised by the Member State in which they seek residence.

An important principle is that Member States "reserve the right" to make the entry and stay of family members conditional upon

> "the availability of adequate accommodation and of sufficient resources to avoid a burden being placed on the public funds of the Member State concerned, and on the existence of sickness insurance."[166]

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[166] It is usually required that the third country national resident be employed or have other income sources of his or her own. An interesting case in this respect is that in which, in its Sentence No.28, of 19 January 1995, the Italian Constitutional Court interprets Article 4 of the Law No.943/86. This Law implemented the standards of the ILO Convention No.143, Italy being one of the three Member States that ratified the Convention. Article 4 of the Italian Law regulates the family reunification of third country nationals living in Italy. It establishes that non-Community citizens have the right to ask for family reunification if they are legally resident and legally employed in Italy and if they are able to provide

It is also stated that Member States "reserve the right" to refuse entry and stay to a family member "on grounds of public health". Finally, Member States will "normally" refuse entry and stay to a family member,

> "if his [or her] presence would constitute a threat to national security or public policy ('ordre publique')."[167]

b) A comparative reference

(i) rules of international treaties - a general outlook[168]

The principles of the resolution can be examined in comparison with some rules of relevant international treaties on the matter.[169]

Article 44 of the UN Convention on the Protection of All Migrant Workers,[170] provides for the family reunification of a migrant worker with a person with whom he or she has a relationship equivalent to marriage according to the applicable law in the State of employment. Provision is also made regarding family reunification with their children, provided these are minor, unmarried and dependent on the parents.[171] Article 44(3) of the same Convention calls for States in which migrant workers are employed to favourably consider on humanitarian grounds granting equal treatment to other family members with regard to reunification. A requirement for family reunification included in this Convention is that the foreign residents be legal residents in the country concerned. This is a condition repeated in all international treaties containing explicit rules on family reunification of foreigners. However, it is not always requested that foreigners be resident "on a basis which affords them an expectation of permanent or long-term residence", as the resolution requires.

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normal living conditions to the relatives that join them. The relatives that can join them are the spouse, their dependent children who are not married and are minors according to Italian legislation, and the workers' dependent parents. The case was raised by a a Brazilian housewife residing in Italy, who was married with an Italian national. She was denied the possibility that her minor son living in Brazil be authorised to enter and stay in Italy for the purposes of family reunification, on the grounds that she was not an employed worker. The Italian Constitutional Court considered that to be compatible with the Italian Constitution, and with the protection that it affords to the family and the child, Article 4 of that Law had to be interpreted as allowing for the possibility of family reunification to a housewife. For the purposes of family reunification, her situation should be considered equivalent to that of employed workers. See on this case, Gennarelli, M.F. "Lavoratrice casalinga extracommunitaria e ricongiungimento familiare", *I diritti dell'uomo - cronache e battaglie*, Year V, 1994, No.3, pp.73-5.

[167] Cf. with resolutions on self-employed persons and on students, examined above. They declare that their principles do not prevent the application of national rules on public policy, public health and safety (according to the resolution on students) and on law and order, public health, national security, or public security and public order (according to the resolution on self-employed persons).

[168] See *Rencontre Internationale pour le Droit de vivre en Famille...*, op.cit., pp.15-29.

[169] Naturally, this comparison can only be fully helpful if consideration is made of the precise personal scope and enforcement mechanism of each treaty mentioned. Section B of chapter 1 gives a full account of these.

[170] United Nations G.A. Res. 45/158, of 18 December 1990.

[171] See Article 4 and 44 of that Convention.

In the meantime, the Convention on the Rights of the Child, of 20 November 1989,[172] provides in its Article 10(1) that any request presented by a child, or by his or her parents, to enter into a State or to leave it for the purposes of family reunification, shall be considered "in a positive spirit, with humanity and diligence".

Article 13 of the ILO Convention No.143[173] provides that a "Member may take all measures which fall within its competence (...) to facilitate the reunification of the families of all migrant workers legally residing in the territory".[174] The family, for this purpose, is meant to include the worker's "spouse and dependent children, father and mother".[175]

Among the treaties adopted within the Council of Europe, the E.C.H.R.[176] provides in its Article 8 for the right of respect of family life. This Article was analysed in some detail in section B of chapter 1. Reference is made to that section for a full explanation of the possible relevance of that provision for family reunification of third country nationals in Member States. As recalled there, Article 8 has been more frequently used to avoid the expulsion of aliens than to ask for their entry into European countries. Furthermore, the Article does not provide for family reunification in itself. Nevertheless, in some cases the obligation of its Contracting Parties to authorise entry and stay will be relevant to family reunification. In a limited manner, this obligation was held to exist in Abdulaziz.[177] There, the United Kingdom was condemned for violation of Articles 8 and 14 of the E.C.H.R. for requiring more restrictive conditions for the admission of husbands to join wives living in that country, than for the admission of wives to join husbands. Another interesting case for family reunification is the Gül case.[178] It concerns the refusal by the Swiss authorities to grant a residence permit to a minor son of Mr Gül, a Turkish national resident in Switzerland. Mr Gül, his wife and their baby daughter had been granted a residence permit in Switzerland on humanitarian grounds. They sought also that Mr Gül's son be able to join them. The Swiss authorities based their refusal to grant the residence permit to Mr Gül's son on the fact that Mr Gül had insufficient means to support his wife and his son. Furthermore, they also based their refusal on the fact that they considered that Mr Gül's wife could not look after the son because she was epileptic. This refusal was found to be in breach of Article 8 of the E.C.H.R., in a recent report of the Commission on the case, which is now before the Court.

The case Commission v. Germany[179] also concerned the E.C.H.R., although it was decided by the Court of Justice of the European Communities. It concerned Article 10 (3)

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172 United Nations, G.A. Res. 44/25, entered into force on 2 September 1990, it was ratified by 168 countries, including all Member States, except the Netherlands.

173 UNTS, Vol. 120, p.71.

174 Article 13(1), emphasis added. The same list of relatives is included in Article 15 of the ILO recommendation No. 151.

175 Article 13(2).

176 European Convention for the Protection of Human Rights and Fundamental Freedoms, of November 1950, ETS, No.5.

177 Abdulaziz et al., judgment of 28/5/1985 , Series A, No. 94.

178 Gül v. Switzerland, Press Release of the Registrar of the European Court of Human Rights, No.290 of 6/6/1995.

179 Case 249/86, Commission v. Germany [1989] ECR 1263.

of Regulation 1612/68,[180] which requires that for the family members of a migrant worker to install themselves with him or her in another Member State, the worker must have available for them "housing considered as normal for national workers in the region where he is employed". The Court ruled that, provided that the family lives in appropriate housing conditions when the worker begins his working life in the host State, he or she cannot be required that such condition be satisfied throughout the entire duration of their residence. In the view of the Court, such a requirement would violate the principle of respect for family life contained in Article 8 of the E.C.H.R. and protected as part of Community Law. Therefore, the Court of Justice ruled that the German law which made the granting of a residence permit conditional on the worker's continuing compliance with Article 10(3) was in breach of Community Law.[181]

This may be of relevance to the resolution under examination, because it states that Member States "reserve the right" to make the entry and stay of family members conditional upon "the availability of adequate accommodation", together with the availability of sufficient resources and the existence of sickness insurance. The resolution provides also that the authorisation to stay on the basis of family reunification may be "conditional upon the continued fulfilment of the criteria required for admission." As explained above, in the opinion of the Court of Justice of the European Communities, this requirement could violate Article 8 of the E.C.H.R.. Certainly, in the present state of Community Law, it would not be for the EC Court of Justice to rule on the family reunification of third country nationals residing in the Member States, unless they are already covered by EC Law rules. In any case, there seems to be room to argue that the expulsion of a family relative within the conditional period, may give rise to a violation of Article 8 of the E.C.H.R.

In the meantime, Article 19(6) of the European Social Charter[182] provides that Contracting States shall "facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory." This formulation of the workers' situation, required for family reunification purposes, contrasts with the expression commonly used in the Social Charter: "worker lawfully within their territories". The difference may express the intention that an alien must be legally capable of remaining indefinitely in the country in order to have the right to ask for family reunification.[183] In any case, according to the Annex of the Social Charter, for the purposes of Article 19(6), the "family of a foreign worker", is understood to mean "at least" his wife and dependent children under the age of 21 years.[184]

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[180] Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community, OJ L 257/2 of 19/10/68.

[181] See Case 249/86, quoted supra, paragraphs 10 to 12.

[182] ETS, No.35.

[183] Harris, D., *The European Social Charter*, Charlottesville, University Press of Virginia, 1984, pp.175-6.

[184] See also the recommendation No. 1082/1988 of the Parliamentary Assembly of the Council of Europe, which proposed that admission for family reunification be authorised to: the married or unmarried spouse who has been living with the foreign resident in question for more than a year; the underage children of the couple or of one of its members; the children of full age if they are dependent because of a disability or illness; and dependent ascendants (proposal 2).

Article 12 of the European Convention on the Legal Status of Migrant Workers,[185] authorises family reunification with the spouse of the migrant worker and their unmarried children, when these are dependent on the worker and are considered to be minors by the relevant law of the receiving State.[186] Family reunification is subject to two general conditions. One is that the worker "has available for the family housing considered as normal for national workers in the region where the migrant worker is employed". The other is that the authorisation may be "conditional upon a waiting period which shall not exceed twelve months". Furthermore, by a declaration addressed to the General Secretary of the Council of Europe, these possibilities for family reunification may be made "conditional upon the migrant worker having steady resources sufficient to meet the needs of his family".[187]

Finally, several international treaties of human rights, as well as various national Constitutions, provide for the protection of the family, of the right to family life, and of the right of every person to marry and to found a family.[188] As proclaimed by Article 16(3) of the Universal Declaration of Human Rights,

> "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

Therefore, following Plender, it could be sustained that whilst rules of international treaties "do not amount to evidence of a right to family reunification in general international law";

> "they do however, establish the widespread acceptance of the moral or political proposition that States should facilitate the admission to their territories of members of the families of their own citizens or residents, at least when it would be unreasonable to expect the family to be reunited elsewhere."[189]

Has the ministers' resolution been sensitive to that "moral and political proposition"? It does not seem so. The resolution does not contribute to facilitate family reunification. Moreover, it appears quite clear that in some cases the general principles of the resolution may even be in contradiction with the existing rules of international treaties on the matter. Naturally, the resolution is not legally binding, but the contradiction is relevant inasmuch as the resolution will have practical influence on national legal rules and on their application. Meanwhile, it is also true that the resolution provides for various

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185 ETS, No.93.

186 These worker's relatives are entitled to residence permits on conditions analogous to those which the Convention applies to the admission of migrant workers. Under Article 9 of the Convention, the validity of the worker's residence permit is, "as a general rule", at least so long as that of their work permit. When the work permit is of an indefinite validity, the residence permit shall, also "as a general rule", be issued or renewed for at least one year. The residence permits issued according to these rules may be withdrawn for reasons of national security, public policy or morals; or if the holder, conscious of the consequences, refuses to comply with measures for the protection of public health.

187 Article 12(2). Using the same procedure, a general temporary derogation is also possible, according to Article 12(3).

188 See, e.g., Article 10 of International Convenant on Economic, Social, and Cultural Rights, Article 16 of the European Social Charter, and Article 12 of the E.C.H.R..

189 Plender, R., op.cit., p.366.

derogation and limitation clauses to its general principles. Nevertheless, at least in some cases the principles of the resolution may be incompatible with international rules binding the Member States.

This incompatibility regards several aspects related to the conditions for family reunification, such as those related to marriage and adoption of convenience, to the non definition of the period of residence before reunification is allowed, to the expectation of permanent or long-term residence, or to the type of relatives to be admitted. One concrete and clear example is that of the age that children must have for their admission to be allowed. The resolution envisages the entry of children below a maximum age, which is to be "between 16 and 18 years". This contrasts, for example, with the Social Charter, whose annex, as mentioned above, requires that the children be dependent and under the age of 21 years. Furthermore, the resolution principles in this respect may also be in contradiction with various aspects of the rules of the E.C.H.R., as explained above.

The contrast between the resolution principles and international rules is relevant in two aspects.

First, by setting the resolution principles at a lower level than that of international treaties, the resolution demonstrates that its objective was not the amelioration of the conditions for family reunification, to say the least. As will be argued below, there is the risk that the resolution actually contributes to making family reunification more difficult.

Secondly, the contrast of the resolution principles with rules of international treaties can amount to a plain violation of Public International Law to the extent that the resolution principles are applied. This violation will occur when a specific contradiction (between the "normally applicable" principles of the resolution and international rules) cannot be eliminated by the use of some derogatory or limitation clause contained in the resolution itself. In addition, naturally, a violation of an international treaty can only exist when a Treaty binds the State in question, as far as its specific rule on family reunification is concerned.

In this respect it is useful to recall that, in its Preamble, the resolution mentions that international Conventions governing family reunification are not affected by the "process of seeking further harmonisation" of national policies on the matter. However, in view of the possible contradictions between the resolution and international rules, it would have been more appropriate to include in the main text of the resolution a general and "binding" principle providing for absolute priority of relevant rules of international treaties.

(ii) EC rules on free movement of workers

Section B of chapter 4 contained a detailed explanation of EC rules on free movement of persons, as far as family reunification is concerned. In that section an optimal interpretation of those rules was proposed, so as to facilitate the full achievement of the underlying objectives of the EC rules on free movement of persons, and to respect the fundamental human rights of their beneficiaries. It was recalled that, as far as free movement of workers is concerned, Article 10(1) of Regulation 1612/68,[190] grants "the right to install themselves with a worker who is a national of one Member State and who

[190] Quoted supra.

is employed in the territory of another Member State" to the following of his or her relatives, "irrespective of their nationality": "(a) his spouse and their descendants who are under the age of 21 years or are dependants;" and "(b) dependent relatives in the ascending line of the worker and his spouse." Furthermore, paragraph (2) of the same provision specifies that:

> "Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes."[191]

These rules clearly contrast with the resolution principles', which are far more restrictive as to the conditions and the relatives allowed to enter for family reunification. The EC rules could be a source of inspiration to facilitate the conditions for family reunification of third country nationals residing in the Union. The Commission of the European Communities suggested this, proposing that Member States considered the possibility of approximating their legislation and practice on family reunification to the relevant EC rules.[192] In this spirit, the Commission proposed that eligible persons for family reunification be the worker's spouse, the underage or dependent descendants, and the dependent ascendants of the worker and of the spouse. Furthermore, the Commission suggested that common criteria be defined on the notions of "normal housing", and "availability of sufficient resources", as well as on the conditions linked to the proof of family ties, public order, public security, public health and visas.

The validity of the first residence permit would be connected to that of the foreign person already resident in the country. In addition, still according to the Commission, Member States should consider the possibility of granting a "right to stay" for family members in cases of the death, disablement, or retirement of the applicant, or of the divorce between him or her and the joining spouse.

c) General Assessment of the ministers' resolution on admission for family reunification

This resolution was adopted with the intention of promoting a harmonisation of national policies and legislation on family reunification. However, the resolution is clearly only a small step within such a harmonisation. This is so not just because the resolution does not have binding legal force; but also due to the manner in which its principles are formulated. To assess the effective contribution of the resolution to the harmonisation of national policies, one may consider the changes that its full "respect" would entail. If the principles of the resolution were binding, what difference would they make for national

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[191] Article 10(3), mentioned above, adds that to be entitled to bring his or her relatives, "the worker must have available for his family housing considered normal for national workers in the region where he is employed". It is however provided that this provision, "must not give rise to discrimination between national workers and workers from other Member States." See the reference to case 249/86, Commission v. Germany [1989] ECR 1263, made above in the main text.

[192] SEC (92) 513, of 13/3/1992, chapter 4. According to the Commission this proposal was also based on the fact that, due to the application of the principle of "reverse discrimination"(analysed in chapter 4), rules on family reunification which are less liberal than those of Community Law may apply to nationals of Member States in the so-called "purely internal situations".

legislation? An answer to this question can be sought, even in the absence of an extensive reference to national laws and policies on the matter. In this respect, it is perhaps enough to notice the manner in which the principles of the resolution were formulated. The resolution is full of expressions of a rather vague character, such as "may", "reserve the rights", "must normally", "must in principle". It is rarely explained what grounds can justify the exceptions to the principles "normally" applicable.[193] The resolution resembles more an abridged compilation of the present legal status quo than actually a step towards true harmonisation, even having aside the fact that the resolution itself has no binding legal force.

A few "peremptory" principles can be found in the resolution, but they go against the possibility of family reunification, never in its favour. The tone of the resolution is quite restrictive. It sets the standards at the level of the minimum common denominator. Therefore there is the risk that the resolution creates a dynamic which influences downward harmonisation. It may discourage ratification of more protective Conventions. It may legitimise political discourse sustaining the deterioration of the present protection granted by Member States to the right of family reunification.[194] In this way, the symbolic and concrete value of the resolution is greater than its strict legal value. The message that the resolution transmits by legitimising lower legal standards is more important than the immediate necessary consequences that it entails in strict legal terms.

The harmonisation of national laws and policies on family reunification should be made in a different manner. The harmonisation to be pursued should not diminish the rights to which third country nationals are currently entitled. A standstill provision could be made in that regard. The international rules on the matter, as well as the EC rules of free movement of persons (the latter in particular if interpreted as suggested in section B of chapter 4) should provide inspiration for a substantive harmonisation. Account should be taken of the exceptional circumstances related to a broader concept of family prevailing in some cultures of third countries, as well as of the specific situation of each family concerned. Likewise, special consideration should be given to the situation of heterosexual couples not legally married and to that of homosexual couples. Relatives admitted for family reunification should have an independent residence status after a limited period of time. Even before such a period, exceptional consideration should be given to specific personal circumstances that might justify granting such stable residence status to divorcees, or separated partners. In all cases the persons concerned should have the right of appeal on a decision against their interests. As a stringent general rule, the persons

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[193] Flyn sustains that "[i]nstead of proposing the adoption of family reunion policies based on a common standard of human rights, the governments are actively considering the enhancement of their discretionary powers." See Flyn, D., in the Introduction to "Family Reunion Policies in Six European Countries", op. cit., p.1.

[194] Flyn points out that the "most restrictive provisions in force on different aspects of family reunion policy in each member state may now be generalised across the Community as the prevailing norm", Flyn, D., op.cit., loc.cit., p.1. See also by the Standing Committee of experts in international immigration, refugee and criminal law, *Harmonisation of Family Reunion Policies* ..., op. cit. p.2; and Spencer, op. cit., p.112.

concerned should be allowed to stay in the country until such appeal is definitively decided.

Finally, the harmonisation of family reunification laws and practices should be decided in a more transparent manner - preferably within the Community framework. This resolution was adopted at an ad hoc intergovernmental cooperation meeting of ministers, with neither its draft or its final text having ever been until now officially publicised.[195] In a democratic society it is unacceptable that governments use this type of procedure to set legal standards in matters related with a fundamental human right.

We live in an historical period in which restrictive immigration policies prevail in Europe. The facilitation of family reunification could be one of the most important exceptions to such restrictive policies.[196] While respecting a fundamental human right, it could contribute to the integration of resident third country nationals in Member States.

This should be taken into account in the drafting by the Commission of a Convention "on admission of nationals of non-member countries, announced for 1996 in the Commission's Work Programme for this year.[197]

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[195] As explained before, it was to this resolution that the present author was refused access by the secretariat of the Council.

[196] This idea was even sustained by a document of the Ad Hoc Working Group on Immigration, which prepared the ministers' resolution, see Report 3/12/1991, SN/4038/91, WGI 930, pp.14-5, quoted by the Standing Committee of experts..., in *Harmonisation of Family Reunion Policies* ..., op. cit. p.2. Apparently, later, this idea was forgotten.

[197] COM (95) 512/3 of 15/11/1995; and supplement to the *European Report*, No.2085, 18/11/1995.

C - ACTION AGAINST ILLEGAL IMMIGRATION

1 - Action against illegal immigration : general aspects

An essential part of a immigration policy is the action undertaken against illegal immigration.[198]

As early as 1976, the Commission presented a proposal for a Council Directive on the harmonisation of laws of the Member States to combat illegal immigration and illegal employment.[199] The Directive, as proposed, imposed the charge of heavy fines on employers knowingly employing illegal immigrants. More stringent controls on the arrival of new migrants (e.g., by inland checks) were also envisaged. The proposal was presented under article 100 of the EEC Treaty, its adoption requiring unanimity in the Council. This undoubtedly contributed to the fact that the Council never approved it.[200]

In the context of intergovernmental cooperation, action against illegal immigration has been the object of considerable interest and work - both before and after the Maastricht Treaty. Naturally, an effective policy against illegal immigration involves a wide range of measures, relating to the control of frontiers and cooperation among police forces against international crime, not to mention development aid and external policy in general. What follows are a few notes on the action taken against illegal immigration. They will examine issues of particular pertinence to illegal immigration which will not be dealt with elsewhere in this dissertation. Issues regarding expulsion of illegal immigrants and their readmission by third countries will be dealt with subsequently.

In June 1993, in Copenhagen, the Immigration Ministers adopted a recommendation "concerning checks on and expulsion of third country nationals residing or working without authorisation".[201] According to the Ministers, this recommendation is

> "based on the need for common endeavours to combat illegal immigration, [and] this objective presupposes the improvement of means for checking on and expelling third country nationals who are in an irregular situation".[202]

In November 1993, the first Justice and Home Affairs Council adopted a recommendation on the important subject of trade in human beings for the purposes of prostitution.[203] It was addressed to the Member States and was meant to contribute to an increase in

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[198] On illegal immigration into the European Union see the interesting Article "The new trade in humans", *The Economist*, 5/8/1995, pp.25-6.

[199] See the OJ C 277/2 of 1976 for the first draft and OJ C 97/9 of 1978 for the final proposal.

[200] According to Jacobs, the proposal was not adopted due to the British opposition. The United Kingdom government (the Labour Party) feared that it risked harming race relations in Britain. See Jacobs, A. T. J. M. & Zeijen, H. in *European Labour Law and Social Policy*, Tilburg, Tilburg University Press, 1993, at p.46.

[201] This recommendation was based in a previous document: the Draft Recommendation concerning checks on and expulsion of third country nationals residing or working without authorisation, Ad Hoc Immigration Group, Brussels, 25 May 1993, doc.ref. SN 3017/93 WGI 1516, confidential.

[202] See the supra quoted PRES/93/90 (2.6.1993).

[203] Council Recommendation on the fight against trade in human beings for the purposes of prostitution, annex 4 of the Press Release 10550/93 of the General Secretariat of the Council, Presse 209-G (30.11.1993).

cooperation "towards intensifying the fight against the procuring of prostitutes and towards dismantling networks for the exploitation of prostitution". The Council approved a further document on "efforts to combat the trade in human beings" in June 1994.[204]

This topic was also dealt with by an important political document: the Berlin Declaration on Cooperation in Combating Organised Crime in Europe, which followed the Conference of September 1994 involving governments of the European Union, countries in the process of acceding to it and Central and Eastern European States.[205] The declaration states that "cooperation in fighting all forms of organised crime should be further developed", with particular emphasis to be placed, *inter alia*, on the "traffic of human beings" and "illegal immigration networks." The declaration envisages further examination of possible means of improving cooperation on fighting organised crime. As far as the issue of combating traffic in human beings is concerned, mention is made of the following issues: the eventual "extension of responsibility of bilateral liaison officers to include this area of crime; [the] uniform collection of statistical data as a basis for the preparation of appropriate measures;" and the "drawing up of a manual on legislation and administrative practice in the fight against illegal traffic in human beings."[206]

As far as the issue of action against illegal immigration networks is concerned, several possible means of cooperation are also mentioned: visa policy and the issuing of visas; effective border controls and border surveillance in countries from or through which people are smuggled; "effective action against sea and air carriers transporting aliens without the requisite documents"; "the introduction of provisions that also penalise the illegal smuggling of aliens...in the territory of other participating States"; and "regulations governing the forfeiture of illegal profits from such crimes". A final concrete possible "means of improving cooperation" was described as follows:

> the "rapid return to their home countries or countries of origin of aliens who have been smuggled in or have entered illegally in order to counteract promises by illegal immigration networks of long-term stay in the countries of destination, and to reduce their chances to recruit new victims for their illegal activities."

Meanwhile, it may be mentioned that the Essen European Council, of December 1994, acting on the basis of a German proposal, extended the material scope of the activities of the Europol Drugs Unit so that exchange of information will also concern action against illegal immigration networks. The Europol Convention, concluded in July 1995, gives Europol competence to act in order to prevent and combat, inter alia, "illegal immigrant smuggling" and "trade in human beings".[207]

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[204] See the Press Release of the General Secretariat of the Council on the Council's meeting in Luxembourg, PRES/94/128 (20.6.1994) and Agence Europe No.6259 (n.s.), 25 June 1994, p.11.

[205] The full name is: "Berlin Declaration on Increased Cooperation in Combating Drug Crime and Organised Crime in Europe"; for its contents see the Press Release of the General Secretariat of the Council, PRES/94/182 (14.9.1994).

[206] Note that there is a United Nations Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others, of 21 March 1950, UNTS, Vol.96, p.271, which entered into force on 25 July 1951. It was ratified by 69 countries, including the following Member States: Belgium, Finland, France, Italy, Luxembourg, Portugal and Spain. On

[207] Article 2(2), first paragraph, of the Europol Convention concluded on 26 July 1995, OJ C 316/2, of 27/11/1995.

It may be also recalled that a further recomendation on "harmonising means of combating illegal immigration and illegal employment and improving the relevant means of control" was adopted on the meeting of the Council of Justice and Home Affairs of 21-22 december 1995. It was initially meant to be a joint action.

Finally, it should be noted that the fight against illegal immigration became a common part of the external relations of the European Union. Provisions on this matter are included in Agreements with third countries, as explained in chapter 5.[208]

2 - Expulsion

The expulsion of foreigners who enter a country or stay in it illegally is an essential part of action against illegal immigration and of a restrictive immigration policy. As a result, expulsion has formed an important part of the harmonisation of immigration policies that has been attempted by Member States, both before and after the Treaty on European Union.

Issues relating to expulsion of third country nationals, who stay in or enter a Member State without permission, can be divided in two main groups. In the first place, there are the issues which could be described as making up the internal aspect of the problem. These relate to the organisation of the procedures and practicalities of expulsion from the point of view of the authorities of the Member States : e.g. the obtaining of documents for the order and enforcement of expulsion and the arrangements for transit through other Member States for the purposes of enforcement. In the second place, there is the external aspect of the expulsion, including matters related to third countries' acceptance of the entry into their territory of expelled persons. The internal and external aspects of expulsion will be examined in turn.

Even before the entry into force of the Treaty on European Union, the *ad hoc* working group on immigration had adopted some recommendations on matters related to expulsion. As in relation to other resolutions of the same *ad hoc* working group, the exact legal value of these recommendations is not certain. It is clear that the recommendations are not part of Community Law. However, this tells us little about their precise legal standing, which is even less certain than that of the resolutions adopted under Title VI of the Maastricht Treaty. Furthermore, the detailed content of the resolutions of the *ad hoc* working group was not published and is not very well known. Unfortunately, to a certain extent, the documents and resolutions adopted by the Justice and Home Affairs Council, i.e. after the entry into force of the Treaty on European Union, are also not well disseminated. For this reason the following examination of such recommendations and resolutions is no more than a general overview of them.

a) Expulsion - internal aspects

As early as 1989, the Palma Document already planned action on "removal" of illegal immigrants, to be dealt with by the *ad hoc* group on immigration.[209] That

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[208] Note also that this topic was discussed in the Euro-Mediterrean Conference of Barcelona of November 1995, in Agence Europe, Documents No.1964, 6/12/1995. See also *MNS*, 7/1995, and the Presidency Conclusions of the Madrid European Council of 15 and 16 December 1995.

document envisaged that by 1989 criteria for determining the Member State responsible for the removal of illegal immigrants should be in place and that by the end of 1992 an eventual system of financial solidarity on expulsion expenses should be set up. As was the case in relation to other areas covered by the Palma document, its ambitious plans were not fully implemented.

In December 1992, in London, the Immigration Ministers approved two recommendations on deportation of illegal immigrants from third countries.[210] The first recommendation dealt with "practices followed by Member States on expulsion of people unlawfully present in their territory". It contained guidelines for the procedure to be followed in cases of expulsion, dealing with practical measures for the execution of expulsion decisions and provided for general exchange of information.[211] This recommendation was supposed to be based on the practices of the Member States and to be without prejudice to either Community Law or the provisions of international conventions on extradition.[212] The second recommendation concerned issues relating to transit for the purposes of expulsion. According to it, Member States commit themselves to a general obligation of allowing transit for the purpose of expulsion, unless specific and well-defined reasons for refusal exist.[213]

In that meeting, the Ministers asked the *ad hoc* working group on immigration to work out, in the course of the following six months, the detailed arrangements for facilitating as far as possible the implementation of this second recommendation. Thus, on June 1993, in Copenhagen, the Immigration Ministers were able to approve "conclusions on the application of the provisions governing transit in cases of deportation".[214] They also adopted the above mentioned recommendation "concerning checks on and expulsion of third country nationals residing or working without authorisation".

After the entry into force of the Treaty on European Union, expulsion continued to occupy an important position in Member State's cooperation in immigration matters. Among the priority concerns in the planning of action on immigration matters in 1994

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209 See the Appendix V of House of Lords report, of the Select Committee for the European Communities, on *1992: Border Control of People* Session 1988-1989, 22nd report, London, HMSO, 1989, pp.55-64, at 62.

210 See for the draft form of these resolutions the following documents of the Ad Hoc Immigration Group: Draft Recommendation regarding practices followed by Member States on expulsion, Brussels, doc.ref. SN 4678/92 WGI 1266, and Draft Recommendation regarding transit for the purposes of expulsion, doc.ref. 4687/92 WGI 1275. Both documents date from 16 November 1992 and are classified as confidential.

211 Nanz, op. cit., p.131.

212 See the Conclusions of the Meeting of Ministers responsible for Immigration, London, 30/11-1/12/1992, Press Release of the General Secretariat of the Council, PRES/92/230 (30.11.1992). See also the 26th General Report of the Activities of the European Communities, p.364, point 1070.

213 Nanz, op. cit. p.131.

214 See Bull.EC, 6/1993, p.126. Curiously, this information is not provided by the Press Release on the meeting made by the General Secretariat of the Council, PRES/93/90 (2.6.1993). However, these "conclusions" seem to be referred to by Nanz when stating that the recommendation on transit for expulsion (approved in London, in December 1992) was later supplemented by provisions for its flexible application. See Nanz, op.cit. p.131.

were several measures related to expulsion and readmission.[215] Concerted action and cooperation on execution of expulsion measures were envisaged in general terms. Furthermore, measures were also planned on the follow up (to be eventually done with the help of the U.N.H.C.R.) of the return to sensitive countries of foreigners expelled or to be expelled. The study of the situation of persons that for some reason cannot be expelled was also envisaged.[216]

The importance of the concerns about expulsion was underlined by the objectives announced by the German presidency for the second half of 1994.[217] Especial attention to consultation and cooperation in carrying out repatriation measures was envisaged. The aim of cooperation on the repatriation of individuals was "to reach an agreement on concerted action (...)to put staff and funds to better use", instead of the current situation in which "each Member State has repatriated individuals independently of other Member States, at great expense."[218] In relation to transit for expulsion, the objective was to establish a common approach to unified procedures. Finally, cooperation among Member States was planned in obtaining documents to enable deported aliens to return home. According to the German Federal Ministry of the Interior, foreign missions of certain countries of origin do not provide the required travel documents, or only do so with considerable delay. In the opinion of that Ministry, what is needed for this problem is an agreement between Member States on "concerted action vis-à-vis certain countries of origin".

In November 1994, the Justice and Home Affairs Council adopted one recommendation on the adoption of a standard travel document for the expulsion of third country nationals.[219] This standard document was intended to be used by all Member States, from 1 January 1995, to aid in the expulsion of third country nationals who possess no travel document.

Furthermore, on 23 November 1995, the Council agreed in principle to a recommendation on co-ordination of expulsion orders.

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215 See the *"Programme de Travail prioritaire pour 1994 et structures `a instaurer dans le domaine 'Justice et Affaires intérieures'"*, Conseil de l'Union Européenne, Note de la Présidence, Bruxelles, 2/12/1993, doc. ref. 10684/93 Restreint JAI 12, p.3.

216 Idem.

217 Federal Minister of Interior of Germany, "Objectives and major topics in the field of Home Affairs in the EU in the second half of 1994", September 1994, Bonn, doc.ref.CM\249\249996 - PE 209.051 Or.de., p.3.

218 Idem.

219 Recommendation concerning the adoption of a standard travel document for the expulsion of third-country nationals, adopted at the Ministers meeting of 30/11-1/12/1994. See the document "Background Conseil Justice et Affaires Interieures, Bruxelles, les 30 Novembre et 1er Décembre 1994", Secrétariat Général du Conseil de l'Union Européenne, Bruxelles, 28 November 1994, doc.ref. CM 94-128/6, and the supra quoted Press Release: Presse 252-G (1.12.94).

b) Readmission[220]

(i) General remarks

The other side of expulsion is the readmission of illegal immigrants. Readmission cannot take place without some form of collaboration between the authorities of countries into which expelled persons are to be sent. With this aim in mind a considerable number of readmission agreements have been concluded between Member States and third countries. The collaboration of third countries in the return of their own nationals provided in these agreements,[221] is usually traded for some form of financial aid and, in general, with measures or provisions in the interest of those third countries. It also happens that such collaboration on readmission is traded with the continuation of aid or advantages previously granted, or that were previously negotiated independently of that collaboration.

Several readmission agreements have been concluded between Member States and third countries. Most of these have been bilateral agreements, such as the agreement between Spain and Morocco and the one between France and Algeria.[222] An important multilateral agreement was also concluded between the Schengen countries and Poland on 29 March 1991.[223] It entered into force even before the Schengen Implementing Agreement. Its novelty lays not only in its multilateral character, but also in being one of the first readmission agreements to base the readmission obligation not only on the illegal crossing of frontiers but also on staying in a country illegally.[224]

It should be noted that readmission agreements, strictly speaking, constitute only one of the various aspects of the external face of policy on control of illegal immigration. Another aspect of the external face of such a policy is the reinforcement of controls placed on persons at the frontiers between third countries that neighbour the Union and other third countries. Several agreements, for instance, on concerted action between Member States and neighbouring third countries (notably countries of Central and Eastern Europe) have as their direct or indirect aim the prevention by the third countries in question of the transit through them of illegal immigrants coming from other third countries.

(ii) Cooperation between Member States

The Palma document envisaged that by the end of 1990, bilateral or multilateral agreements would have been concluded with third countries on the readmission of third country nationals. Again, this proved to be too ambitious.

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220 See Denoël, X., "Les Accords de réadmission - du Benelux à Schengen et au delà", *RTDE*, Vol.29, 1993, No.4, pp.635-653; Guardiola, Jean-Pierre "Les Accords de Réadmission" in *Les Accords de Schengen - Quelle Politique Migratoire Pour la Communauté?*, Luxembourg, Institut Universitaire International Luxembourg, 1992, pp.147-166. See also the explanatory statement of the van den Brink report of 2 October 1992 on European Immigration Policy, made on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, doc.ref.A3-0280/92, pp.9-16 at 13.

221 Or, exceptionally, of nationals of other third countries, as in the case of the readmission agreement between the Schengen countries and Poland.

222 A readmission agreement between Germany and Algeria was being negotiated in the first half of 1995, see *MNS*, 5/1995. For an overview of the readmission agreements among all European countries see *MNS*, 7/1995.

223 For a general overview of the content of this agreement see Denoël, op.cit., at p.646.

224 See Nanz, op.cit., p.132.

Before the entry into force of the Treaty on European Union, the European Council of Edinburgh, of 11 and 12 December 1992, produced an important declaration of the "principles governing external aspects of migration policy".[225] The declaration included principles to inform and guide "the approach of the Community and its Member States, within their respective spheres of competence". It was stated that:

> "they will reinforce their common endeavours to combat illegal immigration".

Furthermore,

> "where appropriate, they will work for bilateral or multilateral agreements with countries of origin or transit to ensure that illegal immigrants can be returned to their home countries, thus extending cooperation in this field to other States on the basis of good neighbourly relations"

In addition,

> "in their relations with third countries, they will take into account those countries' practice in readmiting their own nationals when expelled from the territories of the Member States".

This latter principle had already been discussed by the *ad hoc* group on immigration, but it was left for the European Council to declare its importance. This was not only due to the fact that such a declaration needed the solemnity of a body such as the European Council. It was also due to the fact that a meeting of the *ad hoc* working group on immigration (even if made at the level of Ministers) could not speak in the name of the Community.

After the entry into force of the Treaty on European Union, in November 1993, the Council confirmed that in principle a link should be made between association or cooperation agreements and the nature of third country practice on admission of illegal immigrants.[226] However, this principle, which as we have seen is particularly important in relation to countries of Central and Eastern Europe, was asserted with the reservation that it be evaluated on a case-by-case basis.[227]

In the same Council meeting, previous work carried out in the framework of *ad hoc* cooperation culminated in the adoption of "guidelines to be followed by the Union Member States in preparing bilateral or multilateral readmission agreements with third countries". These guidelines dealt particularly with "demarcation of the scope of readmission agreements, the authorities competent to implement them, definition of nationality for the purposes of readmission, time scales and other aspects to be taken into consideration".[228]

One year later, in November 1994, a further concrete step was made. The Council approved a model of a bilateral readmission agreement between a Member State of the

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[225] Declaration in Annex 5 of the Conclusions of the Council, in Bull.EC, 12/1992, pp.22-24, point 1.31.

[226] See the Press Release of the General Secretariat of the Council, on the Justice and Home Affairs Council of 29-30/11/1993, PRES/93/209 (30.11.1993).

[227] The Permanent Representatives Committee was then instructed to continue the examination of the implementation of this principle and to report to the Council at its next meeting. However, no further decisions have so far been adopted on this point.

[228] See the Press Release of the General Secretariat of the Council, on the Justice and Home Affairs Council of 29-30/11/1993, op. cit. supra. It is not stated what the other aspects referred to might be.

European Union and a third country.[229] According to the Council recommendation that adopted it, this model agreement is meant to be used from 1 January 1995 as a basis for negotiations with third countries in this field. It is expressly provided that the model agreement "should be used flexibly by the Member States and may be adapted to the particular needs of the contracting parties".[230]

However, contrary to the plans of the German Presidency for the second half of 1994, it was not possible to adopt soon a model for an additional agreement to supplement readmission agreements.[231] This additional model agreement was meant to "make it easier for the authorities responsible for readmission to apply the agreements in practice". The main objective is the issue of how it is to be determined or proved, "or a *prima facie* case be made out", that a person has crossed a certain border and that he or she holds a specific nationality.[232] This is a practical issue fundamental to the enforcement of expulsion orders and the implementation of readmission agreements.

Finally, note that on 23 November 1995, the Justice and Home Affairs Council came to a political agreement on the readmission clauses to be inserted into the agreements to be signed between the European Union and its Member States and third countries.

(iii) The "parallel Conventions"

Another aspect of intergovernmental cooperation regarding readmission agreements is the extension to third countries of the Dublin Convention and the Convention on the Crossing of External Frontiers. The Conventions that extend to third countries the provisions of those two Conventions are usually known as the parallel Conventions. The parallel Conventions have been in preparation since the drafting of the respective Conventions, negotiated between Member States themselves.

As early as June 1990, the Immigration Ministers declared after their meeting in Dublin, that :

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229 PRES/94/252 (1.12.94). See also the following preparatory documents of the Council of the European Union: "Draft standard bilateral readmission agreement between a Member State and a third country", Brussels, 12 October 1994, doc.ref.8036/3/94 REV3 ASIM 131 Restreint, and the adopted "Council recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country", Brussels, 30 November 1994. For a critical evaluation of this model agreement see the "UNHCR position on the standard bilateral readmission agreements between a member state and a third country", Brussels, UNHCR, United Nations, 1 December 1994, and the UNHCR document "Readmission agreements, 'Protection Elsewhere' and Asylum Policy", of August 1994. Both documents were produced in Brussels by the UNCHR Regional Office for the Benelux countries and the European institutions. See also the Roth report on the "draft Council Recommendation concerning a framework text of a readmission agreement between a Member State and a Third Country", of 20 July 1995, made on behalf of the Committee on Civil Liberties and Internal Affairs of the European Parliament, doc.ref. A4-194/95.

230 Presse 252-G (1.12.94).

231 See the supra quoted document of the German Presidency: "Objectives and major topics..." and the "Specimen de projet de protocole sur la mise en oeuvre d'accords de readmission entre un État membre de l'Union et un pays tiers", Brussels, 26 October 1994.

232 See the supra quoted document: "Objectives and major topics...", doc.ref.CM\249\249996 - PE 209.051 Or.de., p.3.

> "During negotiations on this draft Convention [on the Crossing of External Frontiers] (...) [p]roposals for a multilateral agreement on re-admission will also be examined."[233]

Thus far, substantial progress has not been made in this respect because the Convention on External Frontiers has not been signed yet.

In relation to the Dublin Convention, a preliminary draft parallel Convention was approved in June 1992 as a basis for negotiations with third countries.[234] Formally, negotiations on the parallel Convention cannot start without the completion of the ratification process of the Dublin Convention itself. However, meanwhile, talks have been held on the subject with Austria, Finland, Norway, Sweden, Switzerland and Canada.[235] The EFTA countries then aspiring to accede to the Union were even warned that the Dublin Convention was part of the " 'acquis' built up by intergovernmental co-operation between the Twelve in the field of justice and home affairs, which the acceding States were to accept."[236]

Another point of interest concerns certain doubts that may be raised on competence of the Union to discuss and negotiate on areas covered by Title VI of the Maastricht Treaty agreements with third countries. In Community Law, the Court of Justice has declared that the Community has external competence if such competence is necessary to attain an objective for which the Community has powers in its internal system.[237] However, the Court of Justice does not have jurisdiction on Title VI of the Treaty on European Union. Under these circumstances, it makes little difference if the "parallel Conventions" are negotiated by the Union under the third pillar, on one hand, or merely by the representatives of the governments of the Member States perhaps "meeting within the Council", on the other. In any case they will be adopted by the Member States' Parliaments. This again demonstrates that the character of the third pillar of the Union is constituted by intergovernmental cooperation.

CONCLUSION

This chapter took a predominant legal perspective to examine some instruments of the European Immigration Policy that is now in formation.

One of the most important instruments for such a Policy would be the draft Convention on the Crossing of the External Frontiers. In relation to this there are both positive and less than positive aspects to note.

On the positive side is the primacy of international human rights instruments and the attribution of jurisdiction to the EC Court of Justice. These points are not sufficient but certainly fundamental in the construction of a European Immigration Policy that

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233 Press Release of the General Secretariat of the Council, PRES/90/96 (15.6.1990), p.4.

234 See the Press Release of the General Secretariat of the Council, PRES/92/115 (11.6.1992) after the Meeting of Ministers with responsibility for Immigration, in Lisbon, 11/6/1992, and Bull.EC, 6/1992, point 1.5.13.

235 See the Press Release of the General Secretariat of the Council, PRES/93/90 (2.6.1993) after the Immigration Ministers meeting.

236 Idem, p.2.

237 See Opinion 1/76 ECR[1977] 741 at 755.

respects a minimum threshold of human rights. The inclusion of such rules in the Convention also overcomes some of the main criticisms made against the Schengen Implementing Agreement and the previous draft Convention of the *ad hoc* immigration group. Additionally, the working procedure has improved very much in terms of transparency and this is a very positive aspect. This transparency is certainly influenced by the new legal framework introduced by the Treaty on European Union and may be considered as only normal in democratic decision making. However, the simple fact that the draft rules are made public makes a fundamental difference in comparison to the old intergovernmental cooperation.[238] In any case, there remains room for improvement in this area, namely in relation to the implementing measures of the Convention. Their discussion and approval should be as accessible to the public as the draft Convention was.

On the less positive side there is the fact that the overriding concern of the Convention seems to be the control of the entry of new immigrants from third countries. This may partially contrast with the repeated statements that the Convention is an indispensable instrument for the abolition of internal border controls, the need for the latter being justified by general considerations related not only to illegal immigration but also to public order and to public security. Police cooperation is provided by the draft Conventions on Europol and the European Information System, but these are negotiated separately and is not clear when they will be functioning.

The main concern of the draft Convention on control of the entry of new immigrants from third countries is obvious in three parts of it. First, the Convention is to be applied in principle only to third country nationals who do not have a right of entry and residence in the Union.[239] The exceptions to this general principle,[240] referred to above, are clearly meant to ensure proper control of the entry of new immigrants from third countries and are not concerned with any general security control over the persons that enter and leave the territory of the Union. Secondly, the overriding importance of the concern to avoid the entry of new immigrants is confirmed by the final part of Article 5(4), providing that : "Controls upon entry shall take precedence over controls upon departure." Thirdly, it is particularly interesting to note that there is only a list of persons to be refused entry, not a list of persons to be refused departure. If there was a genuine concern on the global protection of the Union - be it from external immigrants or internal criminals - an eventual list of persons to be refused departure should include both third country nationals and nationals of Member States. The inclusion of nationals of Member States could be justified, e.g., because they are wanted by the police and judicial authorities, or to avoid evasion from parental duties. While a common criticism of intergovernmental activities is that criminals and immigrants are dealt with together too frequently, in this Convention the

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238 See O'Keeffe, "The New Draft ...", op.cit., p.148. O'Keeffe praises the "openness with which this procedure is being conducted by the Member States and the Commission...". He mentions that "[t]he trend would seem to be positive, in that it would seem to incline to more parliamentary scrutiny, judicial control and external comment".

239 Article 1(2).

240 Particularly, the exceptions related to the obligation to cross the external frontiers of the Member States at authorised crossing points and the liability to penalties for violating such an obligation (Article 2.1 &2.2), to the universal submission to identity controls at the crossing of an external frontier (Article 5.1) and to specific arrangements for controls at airports.

control of immigrants seems even to predominate over the control of criminals[241] - except if the latter are third country nationals.

For all the reasons mentioned above, the Title of the Convention would perhaps be more accurate if, instead of "Controls on Persons Crossing External Frontiers"[242] as appears in the present draft, it made explicit reference to "Controls on the Entry of Persons at External Frontiers" or "Controls on the Entry of Immigrants at External Frontiers".

It can be said that the emphasis of the Convention on the control of the entry of immigrants lies in the fact that it is politically easier to reach consensus on measures to control prospective immigrants than, e.g., to control criminals at the external borders. In any case the difference is very significant, especially taking into account the emphasis on international criminality in Europe - at least in the political discourse that justifies the delay in the abolition of controls on persons at the internal borders of the European Union.

Another aspect that must be emphasised is that under the Convention a third country national never has a right of entry to a EC Member State, however limited and conditional it may be. Article 7(1) of the draft Convention, containing conditions for entry for short stays, states that any person "may be authorised to enter", which is quite different from an hypothetical "may enter...", provided that certain conditions were fulfilled. In addition, under Article 7(2)(a), a Member State may always refuse entry to a person fulfilling the conditions of entry of Article 7(1), merely if the name of that person is on its national list of persons to be refused entry. Meanwhile, Article 12 establishes the general rule that persons failing to fulfil the conditions of Article 7 "shall be refused" entry for short stays "into the territories of the Member States". Thus, while a third country national seems to have no real right of entry, there is certainly a duty on the Member States not to let him enter.[243] In this respect it would seem possible to say that the draft Convention introduces no positive European rules with overriding character. The predominant theme of repression of immigration is again confirmed.

Nevertheless, it must also be admitted that, the escape clauses of this draft Convention may also function to benefit third country nationals. Examples of this can be found in Articles 12(2), 20(1) third subparagraph, 23 or 24(2). All these rules provide for exceptional authorisation of entry to a Member State.

This may lead to a different perspective on this draft Convention. Actually, in some respects, rather than search in this draft for what is negative or positive for third country nationals, one should perhaps examine how it changes the present legal status quo. In practical terms, it is certainly very important that Member States have to abide by new rules. Yet, it is also important that exceptional clauses will allow Member States to retain a considerable margin of manoeuvre. Therefore it is possible to imagine that the

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241 Or at least to anticipate it, as the draft Conventions on the European Information System and Europol seem to much more difficult to agree upon than the present one.

242 Cf. Article K.1 of the Treaty on European Union, which provides that Member States should regard as an matters of common interest, inter alia, the "rules on the crossing by persons of the external borders of the Member States and the exercise of controls thereon."

243 Mitigated only by Article 12(2).

Convention will be changed in the future, providing increased uniformity of rules.[244] In this case, the final version of the Convention would already be an instrument of transitional nature. Although, naturally, a future trend to more uniform rules (decreasing the room for each Member State's margin of manoeuvre) may also be achieved through the implementing measures of the Convention.

Another important point regarding some derogatory clauses is their conformity with Article 7A of the EC Treaty. It may be argued that when a provision of the draft Convention restricts the movement, within the Community, of third country nationals who were allowed entry, that provision may be contrary to "an area without internal frontiers". This matter should be addressed in such a way that Community Law and competence (notably under Article 7A) will not be violated.

In any case, it will probably take one or two years for the External Frontiers Convention to be concluded, not to mention to be ratified and implemented.[245] A useful example in comparative terms is the Dublin Convention which determines the State responsible for examining applications for asylum lodged in a Member State. While the subject matter of this Convention is usually regarded as being more consensual than immigration control, this Convention was signed in June 1990,[246] and has not yet been ratified by all Member States.[247] Thus it is questionable whether the External Frontiers Convention will be put in practice before the entry into force of new Union constitutional rules to be adopted by the intergovernmental conference of 1996.

As far as visas are concerned, the European Parliament seems to be right when it suggests that visa policy be used in a positive sense and the entry visa should be seen as a document granting rights to the holder, including when it specifically proposes a right of appeal to a person who is refused the issue of a visa. In the present political environment, it is not likely that this proposal will be accepted, or, even if accepted, that it will be adopted in a really enforceable manner. Nevertheless, it is not acceptable that such an important and sensitive matter be under the absolute discretion of national administrations, without any possibility whatsoever of control being exercised on them.

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244 Even if at the present moment the main problem is that it has proved difficult to reach agreement on this draft.

245 According to Commissioner Flynn, after the Justice and Home Affairs Ministers meeting of 30/11-1/12/1994, the deadline (of October 1994) for adopting the Europol Convention not having been met, the Council was even further away from adopting the External Frontiers Convention. See *Statewatch*, Vol.4, November-December 1994, No.6, p.16. In fact, the Commission's deadline of the end of 1994 to approve the draft Convention on the External Frontiers was, from the beginning, generally seen as being unrealistic. Future developments confirmed that such a critic was correct.

246 With the exception of Denmark, which signed it in the following year.

247 Note also the comments of Bruggeman, W. , according to whom "it will take a few years" before the Europol Convention be in force. See p.15 of Bruggeman's paper "Europol: a castle or a house of cards", based on his speech at the EIPA colloquium "From Schengen to Maastricht", held in Maastricht, on 15 and 16 December 1994.

Meanwhile, the examined Resolutions on admission of immigrants and the fight against illegal immigration confirm the overiding concern in implementing a restrictive immigration policy.

Moreover, the resolutions on admission of third country nationals to Member States do not seem to have been well drafted. Several ambiguous, redundant or useless expressions may be found, such as "must, if so required", "may, in principle", or "may" followed by a binding "will". Sometimes this goes beyond the non-legally binding nature of the resolutions. The repeated use of "may", for instance, is clearly redundant in the context of restrictive measures. The resolutions are meant to be only a minimum set of restrictive standards, rather than to provide for new possibilities for entry, or for any rights of third country nationals. Thus they do not seem to be incompatible with more stringent measures. In any case, the frequent use of "may" indicates, usually, that the fundamental concern of the resolutions is to limit the possibilities for entry of third country nationals into the Union. As is the case in the draft External Frontiers Convention, the resolutions envisage no new possibilities for entry into Member States, but establish new "duties" for Member States to prohibit such entry.

The substantive content of the resolutions is generally open to criticism on the basis that they reinforce a restrictive immigration policy. However, the content of the resolutions is even more questionable in so far as it enforces the restrictive immigration policy in a less than reasonable manner.

To a considerable extent, this is a characteristic also shared by the resolutions on action against illegal immigration, and by the model readmission agreements.

The Immigration Policy of the European Union is still in an embryonic stage. However, there are already grounds for concern about its future development.

Chapter 9

CONCLUSIONS

A - MAIN FINDINGS

Questioning the *status quo*

- Underlying legal assumptions and their role

This thesis aims to call into question the manner in which immigration matters[1] have been dealt with at the level of the European Union. The legal *status quo* in this respect (i.e. the existing rules and their use) is based on, and simultaneously reinforces, a number of assumptions about the Law of the European Community and of the European Union. Although these assumptions are presented as having an intrinsic value, they are often mere instruments of a specific view on how immigration matters should be dealt with.

The following are just some examples of such legal assumptions. The Community has virtually no competence to deal with matters related to immigration from third countries[2] and to third country nationals living in the Member States. Article 7A of the EC Treaty, providing for the establishment of an internal market "without internal frontiers", is not violated even if checks on persons (for example third country nationals) are performed at ... internal frontiers. The only reasonable interpretation of Article 48 of the EC Treaty is that the free movement of workers for which it provides, can only apply to nationals of a Member State.

This is simply not true, as pointed out throughout this thesis. These and similar assumptions do not conform to a proper interpretation of the existing legal rules. However, the worst is that these types of assumptions, highly questionable as they are, are too often taken for granted. Too often they are not discussed. They are not seen as simply one of the possible hypotheses for interpreting the existing relevant rules. They are seen as their sole plausible or reasonable interpretation. In this way, what is a mere political opinion becomes the authentic interpretation of a legal rule, what is doubtful becomes certain, what is questionable becomes indisputable. A sort of "conventional wisdom" is created.[3]

This legal "conventional wisdom", and its assumptions, support a specific view on immigration policy. A view that is shared by most politicians of the Member States, including politicians with governmental responsibilities. I am referring to the view that, presently, a European immigration policy should be concerned with avoiding new immigrants from third countries and should adopt restrictive measures on the rights of third country nationals living in the Union. In the meantime, the adoption of measures in

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[1] These matters are to be understood here as including both immigration from third countries to the European Union and the situation of nationals from third countries living in a Member State.

[2] Except as far as Article 100 C, on visas, is concerned.

[3] Naturally, these assumptions are not always explicitly formulated, they are occasionally qualified, and a different degree of emphasis is put by different authors in each of them. Nevertheless, they are often linked, they permeate the discourse of a broad range of political actors and they all serve the same purpose.

their favour should be avoided. I will refer to this policy as a restrictive immigration policy.

I do not agree with this policy. Since the mentioned legal assumptions support a restrictive immigration policy, and since such a policy permeates most of EU Law on the matter, it was important to challenge the validity of such assumptions. A considerable part of the thesis took this perspective to examine the Law of the European Union on immigration matters.

The analysis of European Union Law on immigration matters was made regarding both (1) institutional issues, in a general sense, and (2) substantive issues.

(1) As far as **institutional aspects** are concerned, two types of issues are particularly open to criticism. First, (a) issues regarding competence: the division of powers between Member States and the Community or Union, and the use by the latter of their existing competence. Secondly, (b) issues regarding the institutional framework in which immigration matters are dealt with, including the functioning of such framework. After referring to these two types of issues, (c) some reflections will be made on the deep reasons for the present state of affairs regarding both competences and the institutional framework. A final point (d) will be made regarding the structure and functioning of the EC legal order.

(a) As far as **competence** is concerned, immigration matters should be treated to a greater extent at a joint level than they presently are. This joint treatment should be made through the addition of new explicit competences to the European Community (e.g. on the fight against racism) and through the use of the already existing EC competences.

In this respect, chapter 2 contradicted the assumption that the European Community does not have competence to act on immigration matters. The Community does at least have a potential competence to act in this field. Articles 100 and 235 of the EC Treaty, for example, provide a legal basis to act on immigration matters. In most cases, it can be argued that issues related to third country nationals "directly affect the establishment or functioning of the common market".[4] Likewise, corresponding measures are necessary to "attain (...)one of the objectives of the Community", "in the course of operation of the common market".[5] Articles 100 and 235 have been used to act on matters the close connection of which to the common market could be seen as doubtful. They have been used to adopt measures in a wide range of fields, including, for example, money laundering,[6] insider dealing,[7] and acquisition and possession of weapons.[8] These three fields are usually considered to pertain to the public order of each Member State, thus to

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[4] Article 100 of the EC Treaty.

[5] Article 235 of the EC Treaty.

[6] Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering, OJ L 166/77 of 28/6/1991.

[7] Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ L 334/30 of 18/11/1989.

[8] Council Directive 91/477/EEC of 18 June 1991 on the control of the acquisition and possession of weapons, OJ L 256/51-58 of 13/09/91. This Directive was adopted under Article 100 of the EC Treaty.

prerogatives of Member States sovereignty. Nevertheless, there was consensus that it was appropriate to regulate them at a Community level. Another interesting example is that of the 1979 Directive on the protection of wild birds,[9] adopted under Article 235, before the introduction by the Single European Act of explicit EC competences on the environment. The preamble of the Directive recalls that a considerable part of the birds concerned are migratory birds. Would it make sense to say that EC measures on wild migrant birds (e.g. coming from third countries) have a more sound legal basis than possible measures on migrant workers from third countries? I do not think so.

Furthermore, the ruling of the Court of Justice in Demirel,[10] is a basis for sustaining that when the Community concludes agreements with third countries, it acts within its competence and exercises its own powers, as far as provisions on the legal status of third country nationals in the Member States are concerned. Therefore, as far as such provisions are concerned, legally speaking these Agreements are not mixed agreements - contrary to what is usually considered, particularly by national governments.

The point is, therefore, that there is no overriding legal obstacle to the adoption by the Community of measures on third country nationals. The key to explaining why immigration matters are not dealt with in the Community framework lies in obstacles of a political and not legal nature. In this respect this thesis tried to emphasise the political (and ethical) debate on these matters, rather than let them be avoided through the use of an incorrect legal assumption. The lack of political will to act within the EC in this field should not be allowed to hide easily behind such an assumption.

Moreover, as chapter 3 explained, it is not only legally possible, but is a legal obligation for the EC to act on third country nationals. This obligation derives from Article 7A of the EC Treaty and is binding in so far as necessary for the establishment of the internal market, as defined by that Article. The legal obligation to act is particularly clear regarding the abolition of internal border controls. For a full compliance with Article 7A, border controls on persons should be abolished in relation to all persons, including third country nationals. Arguments were adduced in favour of the (partial) direct effect of Article 7A in respect of controls of persons at EC internal borders - so that such provision could be invoked against controls performed after 31/12/1992. Furthermore, the lack of Commission proposals for EC measures to abolish internal border controls by that date, entails that this institution has a responsibility for failure to act. However, judicial action of the European Parliament against the Commission on this matter does not seem very likely to have much success. This is due to the high sensitivity of the issue in a problematic period of European integration, as well as to the past case-law of the Court on institutional failure to act, to the changes brought about by the Treaty on European Union and, last but not the least, to the proposals on the matter presented in July 1995 by the Commission.

In any case, the problem is that the possibility to act on third country nationals within the Community depends on the attainment of unanimity in the Council, a

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[9] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L 103/1 of 25/4/1979, later amended. This Directive was adopted under Article 235 of the EC Treaty.

[10] Case 12/86, Demirel [1987] ECR 3719, paragraphs 8 and 9. See also Weiler, J. "Thou Shalt Not Oppress a Stranger (EX.23:9) : On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique", in *Free Movement of Persons in Europe...*, op.cit., pp.248-271, at 258-9.

requirement included in Articles 100 and 235 of the EC Treaty.[11] Several governments of the Member States have resisted the use of the Community framework to deal with immigration matters. Instead, they initially acted on those matters through ad hoc intergovernmental cooperation. The conformity of this cooperation with the EC Treaty was disputed in chapter 6, notably as far as the establishment of the internal market is concerned. Later, through Title VI of the Treaty on European Union, Member States created an alternative formal framework for the treatment of immigration matters. However, the Community competences were not reduced. From a legal standpoint and to a considerable extent, Member States can now choose either the Community framework, or that of the third pillar, to act on immigration matters. A kind of framework or procedure "shopping" is possible.

The issue of competence was also examined in relation to Article 100C of the EC Treaty, giving the Community explicit competences to act on visas. It was suggested that the Community has competence under Article 100C to adopt a "positive list" concerning visas - i.e. a list of countries whose nationals can enter into the Union without a visa. This is based on two justifications. First, the relevant part of the present version of that Article repeats *ipsis verbis* the equivalent part of the last Dutch draft proposal - which granted the EC competence to draw a positive list. So it can be presumed that, by not changing that provision, the Treaty drafters did not want to change its wide material scope. Secondly, the EC competence under Article 100C on the list of visa countries is the single substantive exception to the Union competence on third country nationals under Title VI of the Treaty on European Union.[12] Thus it may be assumed that it was not meant to be interpreted in a restrictive manner. On the other hand, the Community does not seem to have competence, under Article 100C, to rule on mutual recognition of national visas. Such competence does not seem to conform with the intentions of the drafters of the Treaty on European Union, nor with the strict division of competences on visas between the EC Treaty and Title VI of the Treaty on European Union. This division of competences may not make much sense, but it seems intentional. Therefore, although questionable, the rules of the game have to be respected.

(b) Issues regarding the **institutional framework** in which immigration matters are dealt with, including the **functioning** of such framework, are also open to criticism.

Only a small part of matters related specifically to immigration matters have been dealt with within the framework of the European Community.[13] Immigration matters have been fundamentally dealt with through an intergovernmental cooperation procedure. In chapter 7, it was explained that Title VI of the Treaty on European Union, on

[11] This is also required for the conclusion of association agreements with third countries. That conclusion was regulated by Article 238(2) before the entry into force of the Treaty on European Union, and is now regulated by Article 228(2). The unanimity requirement is one of the reasons why external agreements with third countries (with provisions on the legal status of third country nationals in the European Union) are considered by national governments to be mixed agreements and are ratified by national parliaments.

[12] Under Article 100C the Community may also adopt a uniform format for visas. However, even if important in itself, this is a rather formal and secondary matter.

[13] That is the case for the status of third country nationals who are relatives of migrant nationals of a Member State, for the implementation of EC Agreements with third countries (as far as the rules on their nationals in the Union are concerned), and for the matters covered by 100C of the EC Treaty.

"Cooperation in the Fields of Justice and Home Affairs", basically formalised the previous ad hoc intergovernmental cooperation. In most respects the Treaty on European Union did not bring a fundamental change to such cooperation. Under Title VI, as a rule the Council takes decisions by unanimity. This has prevented the achievement of satisfactory progress in this area. Furthermore, under Title VI there is no true balance of powers between the different institutions. The Council is the master, being able to adopt decisions almost alone. It is not dependent on the Commission's proposals because Member States can also present them, and in some fields only the Member States may present them. The Council can eventually approve measures without their preparatory documents being accessible to the general public. As far as the Parliament is concerned, the Council has nothing more than the superficially defined and not judicially enforceable duty of informing it, consulting it, and taking its views "into consideration". In general terms, the Council is not subject to the control of the Court of Justice of the European Communities. The competence of the Court is restricted to Conventions approved in the framework of Title VI, and only in the event that Member States unanimously agree with granting to that Court such competence. This overall situation seems to be far from perfect within a democratic society. The lack of transparency, and the lack of adequate parliamentary and judicial control at the level of the European Union, are particularly negative since they are not usually adequately compensated for at the national level. It is not acceptable that the institutions of the European Union be allowed to be structured and to function in a manner that goes against the democratic traditions of the organisation and functioning of the modern *État de Droit* in Europe. The Union cannot constitute a retrogression from democracy.

(c) The **explanation for the present state of affairs regarding the institutional aspects** of the treatment of immigration matters in the European Union, seems to lie in two main factors. First, the fact that we are living in a transitional phase from a mere common market to a true political union. Secondly, the emphasis prevailing in Member States on a restrictive immigration policy.

The transitional phase may contribute to explaining why Member States have been resisting so much the treatment of immigration matters within the Community. Some times such resistance seems to be clearly unnecessary to preserve existing national sovereignty. Instead, it should be understand as an expression of the fear of Member States that the EC may gradually overtake their competences in these matters. The treatment of immigration matters (together with the abolition of internal border controls) may be put against the background of European integration in general. Initially, the European integration process seemed to be concerned only with strictly economic issues. But the evolution of such process demanded an increased treatment of issues with increasingly clear social and political repercussions. Some of these issues are seen as having a closer relationship with national sovereignty, than the strict economic issues previously treated. In this context, immigration matters and the abolition of border controls are simultaneously a consequence and a catalyst of progressive integration. In any case, I contend that the resistance of Member States to the treatment of immigration matters within the Community and Union is not consistent with the current process of economic and political integration. What in

previous times could be seen as marginal or secondary for European integration appears now to be increasingly central for it.

In the meantime, one has to keep in mind the emphasis on a restrictive immigration policy. To a lesser or greater extent, such policy has prevailed in Member States since the middle of the seventies, and has been fuelled, inter alia, by racism and high unemployment. Politically, immigration matters are a highly sensitivity topic. Secondary differences among Member States on this matter are seen as being more important than in other matters. The emphasis on a restrictive immigration policy may explain positions and solutions that cannot be justified by the mere concern to preserve national sovereignty. This is the cause for the general lack of transparency, and the lack of adequate parliamentary and judicial control at the European level, characterising intergovernmental cooperation. Naturally, an eventual need to obtain assent of the European Parliament to adopt measures, or control by the Court of Justice, could diminish the margin of manoeuvre of national governments. But more important than this seems to be the desire of the national governments to operate as freely as possible in immigration matters. This concern may apply both at a national and at a European level. Anything that may put in danger the effectiveness of a restrictive immigration policy is avoided. Transparency could lead to public discussion of restrictive measures and pressure from immigrant associations and human rights groups. Any concrete power of the European Parliament could lead to difficulties in adopting restrictive measures, especially because it has usually been more progressive than most of the national parliaments. The possibility of review by the Court of Justice of the compatibility with human rights standards of restrictive immigration measures could undermine the effectiveness of the latter. The will to assure the full effectiveness of a restrictive immigration policy prevails over the concern for respect of fundamental human rights and for democracy within the European institutions.

This challenges the official argument that the intergovernmental cooperation framework (notably that of Title VI of the Treaty on European Union) is necessary in order that national sovereignty be respected. It is my contention that the institutional framework within which immigration matters are handled in the European Union is not fully explained by the wish to retain national sovereignty. To a considerable extent, that institutional framework is the result of the wish to retain the possibility of making a specific use of that sovereignty - a use that favours a restrictive immigration policy adopted under less than optimal democratic conditions. It seems clear that this use of national sovereignty is open to challenge, even by those that may be concerned with the preservation of national sovereignty in the current process of European integration.

(d) Another point may also be made from a broad institutional, or structural perspective. This relates to the fact that the EC Law relevant for the treatment of immigration matters highlights the defects, or **characteristics**, of the structure and functioning **of the Community legal order**. One example is the difficulty in forcing the Council to act, in cases in which the EC Treaty obliges it to adopt measures, but where these have to be adopted unanimously. The failure of the EC institutions to adopt legislation to abolish internal border controls, or to adopt a uniform procedure for elections to the European Parliament, for example, is related with the weakness of the system of enforcement of the obligations of the EC institutions to act. However, this

weakness does not seem to derive from any oversight in the creation of the EC system, being instead a predetermined feature of that system. Another example relates to the precise definition of the scope of EC Law and the protection of human rights within the EC legal order. The non review of human rights by the Court of Justice in cases such as Demirel and Bozkurt, highlight the lack of a precise delimitation of frontiers between national and Community legal orders, as well as the lack of a precise catalogue of human rights to be respected in EC Law.

(2) On the substantive side of European Union Law on immigration matters, I dealt both with (a) aspects related to the regulation of the entry of third country nationals into the European Union and to (b) their legal status in the European Union.

(a) In what relates to the **regulation of the entry** of third country nationals into the European Union, chapter 8 analysed Commission proposals for the control of external frontiers, as well as the various resolutions Council on admission of third country nationals, and on action against illegal immigration.

It was shown how the overriding concern of the European Immigration Policy in formation is the restriction of new immigration from third countries. This is criticisable insofar as a restrictive immigration policy is also open to criticism. Furthermore, the instruments and rules used to implement such policy can be questioned from the point of view of respect of fundamental human rights.

Particular attention was given to the Commission's draft Convention on the Control of External Frontiers. The respect of fundamental human rights is at stake in several aspects of this draft Convention. The Convention will make it more difficult for people from third countries to seek asylum in the Member States. Furthermore, the exchange of information that it envisages requires adequate protection of personal data, which is yet to be regulated. This is a very important point, because fundamental human rights can be seriously undermined by the accidental misuse of personal data, or by its intentional abuse for illegitimate aims. Besides, it is important that, according to the Commission's proposal, the Court of Justice be given jurisdiction on interpretation and disputes related to the implementation of the Convention. From a more general point of view, it was also stressed how the overall concern of the Convention is to prevent new immigration from third countries. Several rules of the Convention require and justify restrictions of the Member States on entry of third country nationals. Moreover, under the draft Convention, a third country national does have the right to enter a Member State ever, for example, as a tourist. Such right never exists under the draft Convention, however limited and conditioned it may be. At the same time, special clauses leave Member States significant room to manoeuvre towards action against certain general principles of the Convention. Therefore, in practical terms, the draft Convention seems important mainly as a framework for a uniform control of the external borders of the European Union. Such uniform control will only be achieved by a gradual process, of which the Convention will be one, albeit important, step.[14]

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[14] The Schengen Agreement is also an important step in that process, but does not apply to all Member States.

As far as the Commission proposals on visas are concerned, the European Parliament seems to be right when it sustains that a visa should be used as a positive instrument of an immigration policy, one that gives certain rights to the holder. Thus, the rule of law should apply to the issue of visas. When it is decided which are the countries whose nationals have to hold a visa to enter the European Union, the criteria for such decision should be transparent. Furthermore, persons who are denied a visa should have real possibilities of appealing against that decision. This is yet to be achieved.

Another important part of the regulation of the entry of third country nationals into the European Union are the resolutions on admission of immigrants to a Member State and action against illegal immigration. As far as the resolutions on admission to the Union are concerned, they establish common standards which constitute a low common denominator. Thus, although legally not binding, they may legitimise an even more restrictive immigration policy. While they grant no rights of entry into the Member States, they establish new "duties" to prohibit such entry. Moreover, they use rules and instruments of too severe a nature, some times even disproportionate to their objectives. Finally, their drafting quality is poor. As far as action against illegal immigration is concerned, it was emphasised, for instance, that the export of the control of immigration to neighbouring third countries may result in a decrease in the guarantees available to asylum-seekers.

The instruments planned, or already in force (e.g. on visas), in the European Union entail the creation of a very powerful system of control of immigration. That system should not be allowed to work at the cost of entailing violation of human rights.

(b) As far as the **legal status of third country nationals in the Union** is concerned, the thesis examined the EC rules on free movement, social affairs and education, and those of external agreements.

Chapter 4 challenged the assumption that the best or only reasonable interpretation of Article 48 of the EC Treaty, providing for free movement of workers, is that it only applies to nationals of a Member State. More generally, it was argued that the extension of EC Law on free movement to third country nationals would avoid some peculiar situations, which arise from the exclusion of third country nationals in such area of EC Law. One of the various examples of such situations regards EC rules on coordination of social security schemes for persons who have worked in different Member States. The wife and orphan children of a deceased worker (third country national) can benefit from such rules if they themselves are nationals of a Member State. However, if they are nationals of third countries, they cannot benefit from them. This seems to go against basic material justice. Furthermore, this cannot be justified as an issue solely concerned with national sovereignty, because the relevant Community Law did not give the deceased third country nationals a right to go and work in another member State. He or she could only work in different Member States with the permission of their national immigration authorities.

Also of interest is the legal status of third country nationals who are relatives of migrant nationals of a Member State, when the latter changes residence from one to another Member State under EC Law on free movement of persons. The rules of

secondary instruments of EC Law on the right of residence of third country nationals spouses or partners (of that migrant) are particularly open to criticism. In the event of a divorce, the third country national spouse of a national of a Member State loses his or her Community right of residence in the host Member State. Furthermore, an unmarried partner who is third country national (including an homosexual partner) hardly ever has a right to reside in the Member State to which his or her partner (national of a Member State) has moved. It makes no difference for Community Law whether or not they live in a stable and durable relationship. It was argued that these rules do not conform to a proper interpretation of EC Treaty provisions on free movement of persons. Moreover, it was explained how in certain circumstances these strict Community rules may even violate the European Convention of Human Rights.

While EC rules on free movement of workers do basically exclude third country nationals from their personal scope, the EC legislation on social affairs and on education includes in its personal scope third country nationals living in Member States. This can be seen as a practical recognition that they are members of European society. The denial to third country nationals of certain rights of free movement (notably of workers) seems to be inconsistent with this de facto membership. Likewise, the Union Citizenship created by the Treaty on European Union is reprovable inasmuch as it reinforced the exclusion of resident third country nationals by being absolutely reserved to nationals of a Member State. There are sound reasons to sustain that it should be extended to third country nationals residing in the European Union.

In any case, perhaps the most important part of the existing EC Law specifically concerned with third country nationals is that constituted by the Community agreements with third countries. Those agreements vary according to the third country concerned, but contain important rules on several domains relevant for the status of third country nationals in the Union - such as equality in working conditions, remuneration, and, in some cases even on equality in social security, as well as rules on the rights to work and reside, on the right of establishment, on provision of services, and on the right to education. The rulings of the Court of Justice on the relevant provisions of the Agreements have been quite protective of the situation of third country nationals. This protection has been achieved, for example, through the recognition of the direct effect of certain provisions of the agreements. But the Court has been less daring in what relates to the review of human rights, which was at stake in some cases related to the application of the Agreements. The case of Bozkurt is an example that such non review of fundamental human rights may entail quite negative consequences. Another less positive point is that the agreements are far from providing for a general equality status and usually fail to guarantee properly the stability of the residence status of their beneficiaries. Furthermore, certain rights conferred by them, like equality in working conditions and in remuneration, should be applied to all third country nationals resident in the Union. At least at this basic level, the respect for and protection of persons who are nationals of third countries should be assured independently of whether or not their nations have a special relation with the Community.

B - PROPOSALS FOR

AN IMPROVED EUROPEAN IMMIGRATION POLICY [15]

The previous section concentrated on criticising the way in which immigration matters have been dealt with at the level of the European Union.

What, then, should be a proper Immigration Policy for the Union? The following are proposals for its main guidelines.

As a preliminary concern, European Immigration Policy should consider the international context in which migration develops, and should aspire to be coherent with the relations of the European Union to countries from where immigrants come. A European Immigration Policy should take a constructive approach, being both ethical and pragmatic - regarding what it should and can achieve. The rule of Law should prevail in its definition and administrative enforcement, namely by making that enforcement controllable by the judiciary. In its formulation and implementation, absolute priority should be given to the protection of fundamental human rights. A moderately open policy of immigration should be pursued, giving priority to asylum-seekers and family reunification. It should promote the social integration of third country nationals living within the Union: it should take action in their favour, namely by acting against racism and by granting them a general equality status in the social area. Its ultimate goal should be the possibility of their integration as true citizens, participating also in the political life of the society in which they live. All these objectives should be achieved through the Member States acting to a greater extent in a joint manner, and within a more democratic framework, preferably within the European Community.[16]

First, a European Immigration Policy has naturally to bear in mind the **international context in which migration develops** - notably the economic, political and environmental problems of Third World countries. A part of the responsibility for the existence of those problems lies with the countries of the European Union. They should recognise that responsibility. Furthermore, the European Union should work to avoid a deterioration of the world situation that inevitably will affect it in a very negative manner in the future. The policies pursued by the Union in its relations with Third World countries have to address the root causes of migration. This is certainly a long term task, but simply making immigration more difficult is no substitute. Long-term problems cannot be properly addressed with short-term solutions.

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[15] See, generally, O'Keeffe, D., "Reflections on a European Immigration Policy", in *Towards a European Immigration Policy*, Korella, G.D. & Twomey, P.M. (eds.), Brussels, European Interuniversity Press, 1995, pp.19-32; and Withol de Wenden, C., "Migrations et Droits de L'Homme", in *Le Défi Migratoire - questions de relations internationales*, Badie,B. & Withol de Wenden, C. (ed.), Presses de la Fondation Nationale des Sciences Politiques, Montreal, 1994, pp.159-177.

[16] The enumeration of these aspects does not neglect the fact that they are closely connected and may overlap with each other.

A European Immigration Policy should take a **constructive approach**, simultaneously pragmatic and ethical. On the pragmatic side, it should, for example, be aware that the root causes of migration are not going to disappear in the near future. Therefore, it is not realistic to want to stop completely immigration from third countries. Simultaneously, the formulation of an Immigration Policy has to be aware of the present social and political context within the European Union. It has to be conscious of the limits of tolerance and solidarity within the European Union, partly determined by the state of the political debate on immigration matters and by current high unemployment. Only the awareness of the limits of tolerance and solidarity, and of the causes of such limits, will permit the formulation of policies so as to overcome these limits. This is the ethical part of the approach that an Immigration Policy should have. In most cases to accept immigrants, and, in all cases, to treat them fairly, is an ethical imperative. A constructive immigration policy has to take this ethical imperative as a priority, while building a political consensus in its regard. It has to stress that problems created by immigration have to be managed and not just feared.

Furthermore, the **rule of Law** should prevail in the definition and enforcement of a European Immigration Policy. Its objectives and instruments should be clearly established by Law. In the implementation of such objectives, administrative discretion should be reduced as much as possible. In any event, those responsible for administrative acts should be accountable to the judiciary.

In the formulation and implementation of a European Immigration Policy absolute priority should be given to the **protection of fundamental human rights**. I am referring here to a minimum threshold of human rights, like those recognised by the E.C.H.R. (and its Protocols), as well as other rights of a similar importance. The protection of fundamental human rights should also be a transversal concern, covering all the range of activities involved in a comprehensive immigration policy - concerning both the control of entry into the Union and the status of third country nationals while living in it.

Fundamental human rights should be respected in that which regards the expulsion of illegal third country nationals, as well as their arrest and detention for expulsion. In this area, cases of gross violation of the right not to be subject to inhuman or degrading treatment are unfortunately too frequent and serious. Furthermore, no third country national should be refused entry and stay, or deported from a Member State, if that would create a danger that he or she be killed, tortured or subject to inhuman or degrading treatment in a third country. The letter and spirit of the UN Conventions on asylum should be fully respected. Vigorous action against racial attacks should also be taken, namely by giving high priority to this within European police cooperation.

In addition, the right to family reunification of resident third country nationals should be fully respected. Account should be taken of exceptional circumstances related to a broader concept of family prevailing in some cultures, as well as to the situation of the specific family concerned. Meanwhile, a special effort should be made to guarantee the stability of the residence status of third country nationals living in the Union. After living for a certain time in the Union, third country nationals should have a legal right to permanent residence. Likewise, spouses and children should have an independent

residence status after a certain period of time. Exceptional consideration should be given to divorcees and their children, even before such a period.

The control of the external frontiers should also take into consideration the protection of human rights. Personal data, for example, should be protected with the highest standards, as its accidental or intentional misuse can bring very negative consequences for the person concerned. Furthermore, the "exportation" of immigration controls to third countries (through the creation of "buffer zones" and the readmission of immigrants) should also take into account how fundamental human rights are respected by those third countries.

Finally, the importance of this group of human rights requires that the system for their protection be particularly effective. It should include, where pertinent, both preventive and repressive measures, as well as appeal procedures - in which, as a rule, persons should be able to wait in the territory of Member States for the final outcome of the procedures.

As far as immigration of persons from third countries is specifically concerned, a moderately open policy should be pursued. Priority should be given to the immigration of asylum seekers and immigration for purposes of family reunification (even beyond the close family). Temporary immigration for vocational training and for seasonal work should also be allowed.

Apart from the protection of fundamental human rights, a comprehensive European Immigration Policy should promote and encourage the **social integration** of third country nationals residing in the Union. This objective is both justified by the aim of attaining a global social harmony and by the respect that any person living in our society deserves. The vast majority of third country nationals living in the Union is here to stay and cannot be expelled. They are already members of the society in which they live. This is a fact and we had better face it, instead of avoiding of disguising it. Provided third country nationals have lived in the Union for a considerable period, they should be entitled to live within it, enjoying equal conditions of dignity and well-being as nationals of the Member States.

For this purpose the Union should promote and encourage actions in favour of third country nationals residing within the Union. These actions would regard the access to rights and goods indispensable for a decent life, such as proper housing, employment, education, vocational training, social security and social assistance. Where appropriate, EC social programmes in favour of needy persons should include actions specifically oriented to the problems of third country nationals. In general terms, it is important to emphasise that particular care should be taken in the formulation and implementation by the public authorities of actions in favour of third country nationals - namely as far as the granting of rights and provisions of goods to them is concerned. Competition between less favoured people, who are nationals of a Member State, and third country nationals equally in need of help, should be avoided.[17] The reception and integration of third country

[17] Similarly, as a matter of principle and to avoid their xenophobic exploitation, criminality problems caused by third country nationals should be faced in like manner to those caused by nationals of Member States, with both preventive and punitive measures.

nationals should not be made at the cost of the poor people who are nationals of the Member States. This is specially important in a historical phase characterised by a tendency for the reduction of the State's social expenditures.

Another important type of action in favour of third country nationals would be action against racism and racial discrimination. Racism affects also nationals of Member States, but concerns predominantly third country nationals living in the Union. A global programme for the Union on action against racism would involve the adoption of a wide range of measures, such as those proposed recently by the several Council working groups and by the Consultative Commission on Racism and Xenophobia. A part of such measures could be adopted under Title VI of the Treaty on European Union. However, to assure its effectiveness, action against racial discrimination would be better pursued within the Community framework. Finally, EC measures against racial discrimination can arguably be already adopted with the existing EC competences. However, both from a legal and a political perspective, it would be preferable to introduce new provisions in the EC Treaty, granting explicit competence for the Community to act in this field.[18]

Furthermore, any integration policy should respect the cultural and religious identity of the persons concerned. Conceptions which base an integration policy in cultural assimilation are unacceptable. They do not respect human rights, they are not effective, and they hinder the cultural exchange allowed for by immigration.

A further step in the social integration of third country nationals residing in the Union would be to confer on them a general equality status in the social area. The Community dimension of this point would entail the extension to such third country nationals of the personal scope of the relevant EC social programmes and of the EC rules on free movement of persons. It was submitted that Article 48 could be interpreted as being also applicable to all third country nationals with permanent residence in the Community.[19]

The ultimate aim of an integration policy should be the possibility of the full integration of third country nationals **as citizens** in the society where they live.[20] In this respect, the extension of Union Citizenship to long term resident third country nationals could undoubtedly improve their political (and social) integration. However, presently, it seems clear that the access to Member States' nationality still remains more important than the access to Union Citizenship, namely due to the content of the latter. For this reason, and also because of the present political context, it is submitted that priority should be given to the facilitation of conditions of access to the nationality of each Member State.

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[18] This has been suggested by numerous authors and entities - such as the Consultative Commission on Racism and Xenophobia, appointed by the European Council.

[19] For these purposes, a permanent resident would be a person who has an unlimited right of residence in one Member State; or who has resided in one or more Member States for more than a total of 10 continuous years, or for fifteen non continuous years. Moreover, it seems also justified that, after three years of legal residence, EC rules on free movement be extended to refugees in the Community.

[20] For an analysis of the issues raised by the relationship between nationality and citizenship, notably as far as political rights of third country nationals and European citizenship are concerned, see Guiguet, Benoît "Citoyenneté et Condition de Nationalité", PhD thesis, Florence, E.U.I., forthcoming.

Moreover, a European Immigration Policy should be achieved by acting to a greater extent in a joint manner, and within a more democratic framework. It should be more transparent, more accountable to the European Parliament, and submitted to a uniform judicial control such as that of the EC's Court of Justice. The use of qualified majority vote in the Council should be the rule instead of the exception, as presently is the case. Preferably, a European Immigration Policy should be elaborated and implemented through the framework of the European Community.

By way of conclusion, I will recall that the way in which we treat third country nationals in the European Union, and the way in which issues related with them are dealt with in the European Union, is not simply a matter of having a more or less admirable or coherent institutional and legal system. From a more fundamental perspective, it is about what we want to be. It is about the way in which we see others and otherness, and thus, the way in which we see ourselves. That way shows how we are prepared to live with plurality - both to take full advantage of it (when that suits us) and to respect it (when that is not the case).

In this regard the Law of the European Union still has some progress to make.

Immigration problems are frequently quite complex. At the same time, the stakes they raise are high. We have to deal with immigration while we keep and develop further our democratic society, while we keep our commitment to respect and promote human rights. We have to deal with immigration while we keep open to the world and keep our solidarity with other peoples.

It is often a difficult task. However, if we are to take an ethical stance, we have no other choice. For to the extent that Law loses an ethical foundation, it is not Law any more. It is just an instrument of the strong.

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